(29,027)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 477.

SAVAGE ARMS CORPORATION, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1922.

965

In the Court of Claims of the United States.

No. 34234.

SAVAGE ARMS CORPORATION, a Body Corporate,

vs.

UNITED STATES.

I. *Petition and Exhibits.*

Filed Dec. 8, 1919.

he Honorable Chief Justice and Associate Judges of the Court Claims:

he claimant, Savage Arms Corporation, respectfully represents:

It is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Delaware, having its principal business office in the city of New York, and ctory in the city of Utica, in the State of New York, and is en- d in the business of manufacturing arms.

On or about April 30, 1918, the claimant and the United States red into a contract, a copy of which is hereto annexed, marked ibit A, and made part hereof. In said contract it was agreed that claimant should manufacture twenty-two (22) sets of base spare s for Lewis machine guns, model of 1917 (Aviation Type), on sis of 1,000 guns each, in accordance with drawings and specifica- s to be furnished by the Engineering Bureau, Ordinance Department, U. S. Army, and deliver the same to the United States in accordance with the schedule of quantities and deliveries set forth in said contract; and that among the spare parts so ed to be manufactured and delivered were 440,000 magazines as- bled, for which the United States agreed to pay the claimant the of $4.24 each, plus a royalty of 9.28 per cent of the said price he first 337,000 of said magazines, and a royalty of 4.64 per cent he last 3,000 of said magazines.

The United States duly furnished the drawings and specifica- s as required by said contract, and the claimant promptly entered n the performance thereof, and by the 29th day of January, 9, had manufactured and delivered to the United States all of the e parts called for by the said contract, except 142,000 of said gazines; and on the said 29th day of January, 1919, the claimant ready, able, and willing to complete the manufacture of the 142,000 magazines, and to deliver the same in accordance with contract.

4. On January 29, 1919, and after the signing of the armistice wit
Germany, the United States no longer having need for the spa
parts, sent and delivered to claimant a letter signed by Major C.
Sholes, Contracting Officer of the Ordnance Department for th
United States Army, a copy of which is attached hereto as Exhibit
and made a part hereof. In said letter the claimant was requested
the public interest immediately to suspend operations under its sa
contract with the United States to the extent of 298,000 magazine
together with their spare parts. The claimant had in fact alread
manufactured and delivered to the United States under said contra
298,000 magazines, and there remained to be manufactured and d
livered only 142,000 of said magazines. Claimant avers that th
writer of said letter, Exhibit B, inadvertently requested the suspensio
of operations to the extent of 298,000 magazines, while intendin
to request such suspension to the extent of 142,000 magazines. O
September 12, 1919, Lt.-Col. R. H. Hawkins, of the Or
3 nance Department, United States Army, acting on behalf
the United States, addressed and sent to claimant a lett
bearing that date, copy of which is attached hereto, marked Exhib
C, and made a part hereof. In this letter, by direction of the Chi
of Ordnance, claimant was requested immediately to suspend furth
operations under its said contract, hereinbefore described, except suc
operations as might be necessary to complete delivery thereunder of
total (including all deliveries theretofore made) of 298,000 mag
zines, together with their spare parts.

5. On September 24, 1919, the claimant by letter addressed to th
said Lt.-Col. Hawkins, acknowledged the said suspension request
September 12, 1919, substituted for the incorrect suspension requ
of January 29, 1919, and in said letter notified the United Stat
that claimant had suspended work in accordance with said reques
reserving, however, all its rights against the United States for failu
of the Government to fully perform all the provisions of the co
tract hereinbefore mentioned, and especially its rights to recov
all the profits which it would have made had it been permitted to co
pletely perform the said contract. On the same date the claima
transmitted the letter last mentioned to the Secretary of the Roches
District Claims Board, and in its letter of transmittal stated that it w
claimant's understanding that under paragraph 5 of Supply Circul
No. 111 of the War Department, the War Department would n
authorize or make any settlement of payment to a prime contract
on account of prospective profits, and requested the said Secretary
confirm this understanding, if it was correct. By letter of Septe
ber 26, 1919, the Secretary of said Rochester District Claims Boa
informed claimant that its understanding of paragraph 5 of sa
Supply Circular No. 111 was correct. Copies of said letters of Se
tember 24, 1919, and September 26, 1919, are annexed here
4 and made part hereof, and marked Exhibits D, E and
respectively.

6. On October 20, 1919, the claimant wrote the secretary of th
Rochester District Claims Board that the claimant was, and sin

the making of the contract had been, willing and able to complete the entire quantity of 440,000 magazines specified in the said contract, and asked to be informed whether the Government proposed to take delivery of the suspended quantity of magazines under said contract. A copy of said letter marked Exhibit G is annexed hereto and made part hereof. On November 17, 1919, the said Lt.-Col. Hawkins, by direction of the Chief of Ordnance of the United States, and acting on behalf of the Government, advised the claimant, by letter of that date, that the United States would not accept or pay for 142,000 magazines remaining undelivered under the said contract, and that the Ordnance Department was not authorized to pay the claimant any anticipated profits on account of such undelivered articles. A copy of said letter, marked Exhibit H, is hereto annexed and made part hereof.

7. At and prior to the receipt of said letter of January 29, 1919, the claimant was engaged in the performance of the work to be done on its part under the said contract; it had provided itself with all necessary materials, equipment, and labor for the complete performance of the same, and was in every way ready, able, and willing to completely perform the same and to do all things which remained on its part to be done, and the claimant has at all times since the receipt of said suspension request of January 29, 1919, continued to be, and is now ready, able, and willing to completely perform the said contract; but from the said 29th day of January, 1919, claimant has been, and is now, prevented by the United States from completing the performance of said contract.

8. The actions of the Government of the United States as hereinbefore set forth amounted to a breach of said contract on the part of the United States without legal justification or excuse, and thereby the claimant suffered large damages, and thereby the claimant became, and is, entitled to recover of and from the United States all the profits which it would have made had it been permitted to completely perform the said contract. The said profits amount to three hundred and three thousand eight hundred and eighty dollars ($303,880).

9. The claimant is the only person owning or interested in the claim above set forth, and no assignment or transfer of the same, or any part thereof, or interest therein, has been made. The claimant is justly entitled to receive and recover from the United States for and on account of the said damages the sum of three hundred and three thousand eight hundred and eighty dollars ($303,880), after allowing all just credits and set-offs. The claimant has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against it. The claimant believes the facts as stated in this petition to be true.

Wherefore, the claimant prays judgment against the United States in the sum of three hundred and three thousand eight hundred and eighty dollars ($303,880), and for such other relief as this Honorable Court might grant, both at law and in equity, in the premises.

SAVAGE ARMS CORPORATION,
By WILFRED L. WRIGHT,
President.

JESSE C. ADKINS,
Attorney for Claimant.

ANDERSON, ISELIN & ANDERSON,
Of Counsel.

6 STATE OF NEW YORK,
County of New York, ss:

Wilfred L. Wright, being duly sworn, deposes and says that he is the President of the Savage Arms Corporation, the claimant in and which subscribed the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

WILFRED L. WRIGHT.

Subscribed and sworn to before me this 6th day of December, A. D. 1919.

[Notarial Seal]

ALICE C. MACCABEE,
Notary Public, Queens Co., No. 2524.

Certificate filed in New York Co., No. 518.

7 EXHIBIT A.

Purchase Order No. C. M. G. 48 A.

F.

Savage Arms Corporation

and

United States of America.

Ordnance Department,
U. S. Army.

Fixed Price Contract.

Spare Parts for 22,000 Lewis Machine Guns, Model of 1917.

Aviation Type.

Eighty Per Cent (80%) Clause.

Dated April —, 1918; Expires March 31, 1919.

Washington,
Government Printing Office,
1918.

8 These Articles of Agreement entered into this 30th day of April, 1918, by and between Savage Arms Corporation, a corporation organized and existing under and by virtue of the law of the State of Delaware and having its general office at 50 Church Street, New York, N. Y. (hereinafter called the Contractor), of the first part, and the United States of America, by Samuel McRoberts, Colonel, Ordnance Department, National Army, acting by direction of the Chief of Ordnance, United States Army, and under the authority of the Secretary of War, of the second part,

Witnesseth:

Whereas a state of war exists between the United States of America and the Imperial German and the Imperial and Royal Austro-Hungarian Governments and therefore the usual requirements of advertisements for proposals are dispensed with;

Now, therefore, under the laws of the United States in such cases made and provided and in consideration of the mutual agreements herein contained it is agreed that the Contractor shall manufacture twenty-two (22) sets of base spare parts for Lewis Machine guns, model of 1917 (Aviation Type), on a basis of 1,000 guns each, hereinafter called the articles, in accordance with drawings and specifications to be furnished by the Engineering Bureau, Ordnance Department, U. S. Army, and such changes therein as may be made as herein provided, and deliver the same f. o. b. cars at or near the point of manufacture, in accordance with the following schedule of quantities and deliveries:

Quantity.	Name.	September.	October.	November.	December.	January.	February.	March.
44,000	Barrel	730	1,200	1,300	7,740	10,800	11,700	10,530
22,000	Barrel cleaning brush bristle	365	600	650	3,870	5,400	5,850	5,265
22,000	Barrel retaining nut	365	600	650	3,870	5,400	5,850	5,265
22,000	Bolt, complete	365	600	650	3,870	5,400	5,850	5,265
2,750	Butt latch	45	75	80	485	675	730	660
5,500	Butt latch pin	90	150	160	970	1,350	1,460	1,320
5,500	Butt latch spring	90	150	160	970	1,350	1,460	1,320
44,000	Cartridge guide, assembled	730	1,200	1,300	7,740	10,800	11,700	10,530
22,000	Charging handle	365	600	650	3,870	5,400	5,850	5,265
11,000	Charging handle, extension	180	300	325	1,935	2,700	2,925	2,635
5,500	Combination cleaning rod steel	90	150	160	970	1,350	1,460	1,320
11,000	Combination cleaning rod adaptor	180	300	325	1,935	2,700	2,925	2,635
44,000	Cylinder cleaning brush wire	730	1,200	1,300	7,740	10,800	11,700	10,530
33,000	Cylinder cleaning mop	540	900	975	5,805	8,100	8,775	7,905
11,000	Ejector	180	300	325	1,935	2,700	2,925	2,635
5,500	Ejector cover	90	150	160	970	1,350	1,460	1,320
88,000	Extractor	1,460	2,400	2,600	15,480	21,600	23,400	21,060
440	Feed cover, not assembled	5	10	10	80	110	120	105
2,750	Feed operating arm	45	75	80	485	675	730	660
5,500	Feed pawl	90	150	160	970	1,350	1,460	1,320
22,000	Feed pawl spring	365	600	650	3,870	5,400	5,850	5,265
2,750	Front sight base	45	75	80	485	675	730	660
11,000	Front sight base screw	180	300	325	1,935	2,700	2,925	2,635
5,500	Gas chamber	90	150	160	970	1,350	1,460	1,320
11,000	Gas chamber gland	180	300	325	1,935	2,700	2,925	2,635
11,000	Gas regulator cup	180	300	325	1,935	2,700	2,925	2,635
5,500	Gas regulator key	90	150	160	970	1,350	1,460	1,320
5,500	Gas Cylinder	90	150	160	970	1,350	1,460	1,320

2,750	Gas cylinder casing	45	75	80	485	675	730	660
2,750	Gear	45	75	80	485	675	730	660
1,386	Gear casing	20	40	40	245	335	370	336
5,500	Gear stop	90	150	160	970	1,350	1,460	1,320
11,000	Gear stop pin	180	300	325	1,935	2,700	2,925	2,635
11,000	Gear stop spring	180	300	325	1,935	2,700	2,925	2,635
440	Guard, assembled	5	10	10	80	110	120	105
2,750	Guard side piece (pairs only), including 2 rivets	45	75	80	485	675	730	660
2,750	Locking piece	45	75	80	485	675	730	660
440,000	Magazine, assembled	7,300	12,000	13,000	77,400	108,000	117,000	105,300
33,000	Magazine grip box	540	900	975	5,805	8,100	8,775	7,905
110,000	Magazine grip box rivet	1,825	3,000	3,250	19,350	27,000	29,250	26,325
33,000	Magazine latch, assembled	540	900	975	5,805	8,100	8,775	7,905
110,000	Magazine latch spring	1,825	3,000	3,250	19,350	27,000	29,250	26,325
110,000	Magazine strap and clip	1,825	3,000	3,250	19,350	27,000	29,250	26,325
220,000	Magazine strap rivet and washer	3,650	6,000	6,500	38,700	54,000	58,500	52,650
11,000	Magazine center	180	300	325	1,935	2,700	2,925	2,635
440,000	Magazine spacer rivet	7,300	12,000	13,000	77,400	108,000	117,000	105,300
33,000	Magazine top plate	540	900	975	5,805	8,100	8,775	7,905
440,000	Magazine top plate rivet	7,300	12,000	13,000	77,400	108,000	117,000	105,300
44,000	Magazine container cover catch	730	1,200	1,300	7,740	10,800	11,700	10,530
88,000	Magazine container hinge	1,460	2,400	2,600	15,480	21,600	23,400	21,060
2,750	Magazine container loading handle clip	45	75	80	485	675	730	660
22,000	Magazine container spring	365	600	650	3,870	5,400	5,850	5,265
11,000	Magazine loader cartridge cut off screw	180	300	325	1,935	2,700	2,925	2,635
11,000	Magazine loader cartridge cut off spring	180	300	325	1,935	2,700	2,925	2,635
11,000	Magazine loader cartridge chute screw	180	300	325	1,935	2,700	2,925	2,635

Quantity.	Name.	September.	October.	November.	December.	January.	February.	March.
5,500	Magazine loader clip ejector spring	90	150	160	970	1,350	1,460	1,320
2,750	Magazine loader clip ejector plunger	45	75	80	485	675	730	660
5,500	Magazine loader clip ejector screw	90	150	160	970	1,350	1,460	1,320
2,750	Magazine loader post nut	45	75	80	485	675	730	660
2,750	Magazine loading handle	45	75	80	485	675	730	660
66,000	Mainspring, including keeper	1,095	1,800	1,950	11,610	16,200	17,550	15,795
2,750	Mainspring casing	45	75	80	485	675	730	660
5,500	Mainspring collet	90	150	160	970	1,350	1,460	1,320
5,500	Mainspring collet pin	90	150	160	970	1,350	1,460	1,320
22,000	Mainspring retaining rivet	365	600	650	3,870	5,400	5,850	5,265
5,500	Mounting yoke, assembled	90	150	160	970	1,350	1,460	1,320
2,750	Mounting yoke clamp key	45	75	80	485	675	730	660
2,750	Mounting yoke axis pin	45	75	80	485	675	730	660
11,000	Mounting yoke axis pin washer	180	300	325	1,935	2,700	2,925	2,635
11,000	Mounting yoke split keeper	180	300	325	1,935	2,700	2,925	2,635
5,500	Oil can	90	150	160	970	1,350	1,460	1,320
5,500	Piston	90	150	160	970	1,350	1,460	1,320
11,000	Piston connecting pin	180	300	325	1,935	2,700	2,925	2,635
2,750	Rack	45	75	80	485	675	730	660
2,750	Rear sight base	45	75	80	485	675	730	660
22,000	Rear sight base rivet	365	600	650	3,870	5,400	5,850	5,265
22,000	Rebound pawl	365	600	650	3,870	5,400	5,850	5,265
44,000	Receiver locking pin	730	1,200	1,300	7,740	10,800	11,700	10,530
5,500	Recoil check	90	150	160	970	1,350	1,460	1,320
2,750	Safety	45	75	80	485	675	730	660
11,000	Sear	180	300	325	1,935	2,700	2,925	2,635
88,000	Sear pin (or trigger pin)	1,460	2,400	2,600	15,480	21,600	23,400	21,060
88,000	Sear spring	1,460	2,400	2,600	15,480	21,600	23,400	21,060

2,750	Shell deflector bag	45	75	80	485	675	730	660
5,500	Shell deflector bracket fixing screw	90	150	160	970	1,350	1,460	1,320
5,500	Shell deflector bracket fixing screw washer	90	150	160	970	1,350	1,460	1,320
5,500	Shell deflector bracket fixing screw stop nut	90	150	160	970	1,350	1,460	1,320
5,500	Shell deflector latch	90	150	160	970	1,350	1,460	1,320
11								
5,500	Shell deflector latch screw	90	150	160	970	1,350	1,460	1,320
11,000	Shell extractor	180	300	325	1,935	2,700	2,925	2,635
22,000	Sight retaining spring	365	600	650	3,870	5,400	5,850	5,265
2,200	Spade grip, assembled	35	60	65	390	540	585	525
2,750	Spade grip handle	45	75	80	485	675	730	660
2,750	Spade grip tang	45	75	80	485	675	730	660
5,500	Spade grip tang screw	90	150	160	970	1,350	1,460	1,320
5,500	Spring balance	90	150	160	970	1,350	1,460	1,320
22,000	Stop pawl	365	600	650	3,870	5,400	5,850	5,265
88,000	Stop and rebound pawl spring	1,460	2,400	2,600	15,480	21,600	23,400	21,060
88,000	Striker	1,460	2,400	2,600	15,480	21,600	23,400	21,060
176,000	Striker fixing pin	2,920	4,800	5,200	30,960	43,200	46,800	42,120
5,500	Trigger	90	150	160	970	1,350	1,460	1,320
22,000	Spanner	365	600	650	3,870	5,400	5,850	5,265

for the consideration which the United States agrees to pay the Contractor as hereinafter provided.

This Contract will be performed under the following terms and conditions:

Article I. The United States will pay to the Contractor the prices as hereinbelow listed for spare parts:

	Price.
Back sight axis pin	$0.06
Back sight axis pin washer	.01
Back sight axis pin split keeper	.01
Back set bed spring	.21
Back sight body	.85
Back sight stem	1.17
Back sight stem nut	.05
Barrel	7.62
Barrel cleaning brush (bristle)	.18
Barrel retaining nut	1.18
Bolt, complete, consisting of bolt, feed operating stud, and two extractors	10.09
Butt stock, assembled, consisting of stock, plate, two plate screws, tang, and tang screw	7.41
Butt plate	.16
Butt plate screw	.01
Butt tang screw	.01
Butt latch	.44
Butt latch pin	.01
Butt latch spring	.01
Cartridge guide, assembled	.15
Charging handle	.80
Charging handle, extension	.13
Combination cleaning rod, steel, consisting of handle and rod	$0.33
Combination cleaning rod adaptor	.14
Cylinder cleaning brush, wire	.18
Cylinder cleaning mop	.12
Ejector	.02
Ejector cover	.07
Extractor	.41
Feed cover, not assembled	16.33
Feed operating arm, consisting of operating arm and pawl retaining pin	6.64
Feed pawl	.35
Feed pawl spring	.02
Front sight base	1.06
Front sight base screw	.01
Gas chamber	4.08
Gas chamber gland	.85
Gas regulator cup	.70
Gas regulator key	.68
Gas cylinder	2.90
Gas cylinder casing, including regulator key stud	.87
Gear	1.62
Gear casing	4.47

Gear stop	$0.44
Gear stop pin	.02
Gear stop spring	.02
Guard assembled, consisting of guard, right side piece, left side piece, and 2 side piece rivets	4.00
Guard side piece (pairs only), including 2 rivets	.66
Locking piece	11.22
Magazine, assembled (97 rounds)	4.24
Magazine grip box	.12
Magazine grip box rivet	.01
Magazine latch, assembled, consisting of latch, handle, and 2 latch handle rivets	.33
Magazine latch spring	.08
Magazine strap and clip	.07
Magazine strap rivet and washer	.01
Magazine center	1.92
Magazine spacer rivet	.01
Magazine top plate	.07
Magazine top plate rivet	.01
Magazine container, complete (97 round magazine)	2.53
Magazine container cover catch	.08
Mounting yoke clamp key	$0.13
Mounting yoke axis pin	.09
Mounting yoke axis pin washer	.01
Mounting yoke split keeper	.01
Oil can	.46
Piston	1.57
Piston connecting pin	.02
Rack	5.50
Rear sight base	1.04
Rear sight base rivet	.01
Rebound pawl	.44
Receiver locking pin	.04
Recoil check, consisting of body and cap	2.46
Safety	.61
Sear	.42
Sear pin (or trigger pin)	.01
Sear spring	.02
Shell deflector, assembled	10.12
Shell deflector, bag, with hooks and buckle	.38
Shell deflector bracket fixing screw	.46
Shell deflector bracket fixing screw washer	.01

	Price.		Price.
agazine container hinge.....	.03	Shell deflector bracket fixing screw stop nut.....	.01
agazine container loading handle slip.....	.03	Shell deflector latch.....	.44
agazine container spring.....	.04	Shell deflector latch screw.....	.01
agazine loader cartridge cut off screw.....	.04	Shell extractor.....	.34
agazine loader cartridge cut off spring.....	.03	Sight retaining spring.....	.02
agazine loader cartridge chute screw.....	.01	Spade, grip, assembled, consisting of grip handle, grip tang, and grip tang screw.....	4.32
agazine loader clip ejector spring.....	.04	Spade grip handle.....	.11
agazine loader clip ejector plunger.....	.02	Spade grip tang.....	4.13
agazine loader clip ejector screw.....	.01	Spade grip tang screw.....	.09
agazine loader post nut.....	.02	Spring balance.....	1.00
agazine loading handle.....	.12	Stop pawl.....	.49
ainspring, including keeper...	1.23	Stop and rebound pawl spring..	.02
ainspring casing.....	.98	Striker.....	.12
ainspring collet.....	.53	Striker fixing pin.....	.02
ainspring collet pin.....	.74	Trigger.....	.51
ainspring retaining rivet.....	.01	Spanner.....	.59
ounting yoke, assembled, consisting of yoke, clamp, clamp key, axis pin, axis pin washer, axis pin split keeper, and hinge pin.....	5.18	Gun box.....	3.79
		Hand book.....	.11

In addition to the above listed sum for each of the spare parts, he United States agrees to pay to the Contractor, as a royalty, a sum qual to 9.28 per cent of the price for each of the spare parts, except that for such final portion of the spare parts which shall be 3 for one hundred fifty (150) guns there will be paid to the Contractor as a royalty, a sum equal to four and sixty-four undredths (4.64) per cent of the price of such spare parts, all of hich is in accordance with the pamphlet entitled "Reduction of oyalties on Lewis Machine Guns Manufactured for the United tates Government," dated March, 1918, and made a part hereof by eference.

Payments will be made by the United States to the Contractor as llows:

(1) A sum equal to 80 per cent of the actual cost to the Contractor f the component materials, delivered to the Contractor's plant in uantities requisite for the due and timely completion of this con- act, purchased by the Contractor from sources approved by the hief of Ordnance, will be paid to the Contractor promptly and not ter than the 10th day after receipt, by the Chief of Ordnance, of e certificate of the inspecting and receiving officer that such ma- rials have been delivered to the Contractor and inspected and ap- roved by the receiving officer.

(2) If the Chief of Ordnance deems advisable, the United States ay make other and more frequent payments than hereinbefore pro- ided including payments to the Contractor for (*a*) direct labor used

in the production of the articles herein contracted for; (*b*) materials and other property to be used in the performance of this contract; (*c*) pro rata share of the factory overhead expense, applicable to and necessary in connection with the manufacture of the articles; and (*d*) pro rata share of administrative and general expense applicable to and necessary in connection with the manufacture of the
14 articles, provided, however, the sum of all payments as made under the provision of this Article, except payments on account of freight charges, shall not be in excess of the total purchase price.

The title to all material shall vest in the United States simultaneously with any payment on account thereof, by the United States, subject, however, to rejection of title at any time if found not to meet specification requirements. All of such material shall immediately upon its coming into possession of the Contractor, be marked for the purpose of identification, as the Chief of Ordnance shall so direct.

Should any such material to which the United States has taken title, as above provided, be destroyed while in possession of the Contractor, for any cause or agency, the Contractor shall replace the same without expense to the United States.

(3) Upon the certificate of the inspecting and receiving officer, showing delivery and acceptance, the United States will pay the difference between the amount paid under subdivisions (1) and (2) of this Article and the contract price for the spare parts.

Article II. The Contractor shall give to the performance of this Contract preference and priority over any other work or engagements, other than work heretofore given priority by the United States, and, if possible, shall anticipate the above schedule of deliveries.

The Chief of Ordnance may, by written notice to the Contractor at any time, make changes in the drawing and specifications or supplemental or substituted drawings and specifications which re-
15 late to, form a part of, or are added to this Contract. If such changes involve additional expense, a fair addition may be made to the compensation, but if such changes involve less work or labor or material a fair deduction may be made therefrom, all as shall be determined by the Chief of Ordnance. No claim for addition or deduction on account of any change will be made or allowed unless the same has been ordered in writing by the Chief of Ordnance.

The Contractor will not be held responsible for delays in delivery determined by the Chief of Ordnance to have been due to causes beyond the control or without the fault of the Contractor, but, simultaneously with the removal of such causes for delay, the Contractor shall proceed with the performance of this Contract, allowance for such delay having been made. In view of the emergency necessitating this Contract, the Contractor shall use its best endeavors to remove such cause for delay. Deliveries in advance of the date or in excess of the quantities scheduled may be credited on subsequent delivery obligations.

The Contractor shall, at the cost of the United States, ship the rticles to any point in the United States designated by the Chief f Ordnance and shall make all the necessary freight and shipping rrangements therefor.

Article III. The articles while in the process of manufacture and hen completed shall be subject to inspection by persons designated y the Chief of Ordnance, and the Contractor shall furnish reason- ble facilities and assistance for all such inspection. All articles nd material which do not in all respects fulfill the requirements of is Contract shall be rejected and the decision of the Chief of Ord- nance as to the quality thereof shall be final.

Upon notice from the Contractor that the articles, or any of them, are completed and ready for delivery, final inspection will be promptly made by the United States.

Article IV. In the event of the Contractor's inexcusable default making the deliveries herein scheduled the Chief of Ordnance ay cancel this Contract, without prejudice to any claim of the nited States hereunder, and complete the manufacture, or purchase sewhere, of all or any of the articles herein contracted for then re- aining undelivered and charge the Contractor with all loss, dam- e, and expense in excess of the Contract price of the articles in- rred as a result of such action.

Article V. No Member of or Delegate to Congress or Resident Com- issioner is or shall be admitted to any share or part of this Contract, to any benefit that may arise therefrom; but this Article shall not ply to this Contract so far as it may be within the operation or ex- otion of section 116 of the act of Congress approved March 4, 1909 5 Stat., 1109).

Article VI. No person or persons shall be employed in the per- rmance of this Contract who are undergoing sentences of imprison- nt at hard labor which have been imposed by the courts of the veral States, Territories, or municipalities having criminal juris- tion.

Article VII. Except as this Contract shall otherwise provide, any ubts or disputes which may arise as to the meaning of anything this Contract shall be referred to the Chief of Ordnance for de- mination. If, however, the Contractor shall feel aggrieved at any cision of the Chief of Ordnance upon such reference, it shall have e right to submit the same to the Secretary of War, whose decision ll be final and binding on both parties hereto.

Article VIII. Wherever the term "Chief of Ordnance" is used in s Contract the same shall be construed to include the Acting Chief Ordnance or any person designated to act as the Chief of the Ordnance Department, United States Army, or any person who is accredited as his duly authorized representative.

Article IX. Notice under this Contract, when not actually given, ll be deemed to have been sufficiently given to and received by

the Contractor when mailed in a sealed postpaid wrapper directed to the Contractor at the address given on page 3 of this Contract.

Article X. Neither this Contract nor any right to receive payment hereunder shall be assigned to any person, firm, or corporation.

Article XI. The spare parts herein contracted for shall be essentially duplicates of the spare parts exhibited to the representatives of the Ordnance Department at the works of the Savage Arms Corporation, Utica, N. Y., and all responsibility for their satisfactory performance upon acceptance test shall rest with the Contractor, unless defects develop as a result of rejection by the Ordnance Department of changes proposed by the Contractor.

Article XII. The Contractor agrees to hold and save the United States, and all persons acting under them, harmless from and against all liability on account of any patent rights granted by the United States which may affect the articles herein contracted for, or their manufacture, or the performance of this contract in any manner whatsoever.

Article XIII. The Contractor agrees to refrain from exploiting by publicity or otherwise its product manufactured in pursuance of this Contract, and the Contractor agrees to refrain from in any way publicly advertising the fact of the manufacture of said product, and to refrain from publishing or causing or allowing to be published any photographs, drawings, written or printed matter, or other data disclosing the articles, or parts of the same, or the process of manufacture, or the plans of the Government, or any information concerning the same or which shall result in such disclosure. The
18 Contractor agrees to submit to the Chief of Ordnance all pictures or printed matter showing, describing, or in any way relating to the progress of the work to be prosecuted under this contract, which it may desire to publish, before publishing the same, and the Chief of Ordnance may prohibit such publication. The Contractor further agrees to refrain from giving any information whatsoever relative to any experiments that may be carried out by it at the instance of the United States.

Article XIV. It is understood and agreed that the Contractor shall retain intact and in good working condition, so long as the Lewis Machine Gun, Model of 1917, Aviation Type, remains a service weapon, all drawings, gauges, fixtures, dies, and other appliances in forming a part of the machine, required in the production of the material herein contracted for; and that the Contractor shall furnish the United States with a blue print of every drawing, fixture, die, and other appliance used by the Contractor in the manufacture of this material, except where such blue print would be duplicate of drawings furnished by the Contractor to the Ordnance Department.

Article XV. It is understood and agreed that the Contractor will not knowingly employ, directly or indirectly, any employee who within the preceding two months, has been employed by any other firm manufacturing machine guns or machine rifles for the Ord-

ıance Department, United States Army, without first obtaining the written consent of such other concern.

Article XVI. It is understood and agreed that a complete set of drawings covering the articles herein contracted for, shall be furnished by the Contractor. This provision is not intended to require the Contractor to furnish drawings which have already been furnished by the Contractor under previous contracts, but it is only intended to require the Contractor to furnish drawings of new material.

9 Article XVII. In addition to the ordinary precautions heretofore adopted by the Contractor for the guarding and protection of its plant and work, the Contractor shall provide such additional watchmen and devices for protection of its plants and property and the work in progress for the United States against espionage, acts of war, and of enemy aliens as may be required by the Chief of Ordnance. The Contractor shall, when required, report to the Chief of Ordnance the citizenship, country of birth, or alien status of any and all of its employees. When required by the Chief of Ordnance the Contractor shall refuse to employ, or, if already employed, forthwith discharge from employment and exclude from its works, any person or persons designated by the Chief of Ordnance for cause as undesirable for employment in a plant engaged on work for the United States. The United States shall pay to the Contractor as part of the cost of the article any expense incurred by the Contractor which shall be determined by the Chief of Ordnance to be directly caused by the requirements of this Article.

In witness whereof the parties hereto have caused these articles of agreement to be executed under their seals (in sextuplicate) by their respective officers, duly authorized, the day and year first above written.

Signatures:

(Stamp:)

(Sgd.) SAVAGE ARMS CORPORATION,
By W. L. WRIGHT,
Vice-President.

Witness:

(Sgd.) A. C. BARKER.

THE UNITED STATES OF AMERICA,
By SAMUEL McROBERTS,
Colonel, Ordnance Department, National Army,
Contracting Officer.

Witness:

EDW. A. DETERS.

Approved:

CHAS. N. BLACK,
Lt. Col. Ord. Dept., National Army.

Contract Section: ——.

Negotiating Section: ——.

Notes.

All manufacturers doing any part of the work contemplated by this Contract shall comply with the provisions of the naval appropriation act approved March 4, 1917, and Executive Order of the President dated March 24, 1917, in respect to wages of persons employed upon contracts with the United States in so far as such provisions may be applicable thereto, so long as said act approved March 4, 1917, and said Executive Order dated March 24, 1917, shall be in force and effect.

The articles covered by the within Contract should be charged to the Chief of Ordnance, U. S. Army.

The original and two (2) copies of the invoice and two (2) copies of the bills of lading and shipping notices, if any, should be promptly forwarded, through the Inspector of Ordnance at the Manufacturer's plant, to the Inspection Division, Ordnance Department, U. S. Army, Washington, D. C.

21 EXHIBIT B.

To insure prompt attention in reply refer to PL No. CMG-48.

War Department,

Office of the Chief of Ordnance,

Procurement Division,

Washington.

Savage Arms Corporation,
Utica, N. Y.

January 29, 1919.

GENTLEMEN:

1. By direction of the Chief of Ordnance you are requested in the pubilc interest immediately to suspend operations under your contract, or order, with the United States, War-Ord-No. CMG-48, to the extent of 298,000 magazines together with their spare parts.

You are also requested, except for the purpose of completing deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further sub-contracts, make no further commitments, and incur no further expenses in connection with the performance of said contract, or order.

2. This request is made with a view to the negotiation of a supplemental contract providing for the modification, settlement and adjustment of your existing contract or order, in a manner which will permit of a prompt settlement.

3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance

epartment will forthwith take up with you the proposed negoti-ion.

Respectfully,

By C. E. SHOLES,
Major, Ord. Dept. U. S. A.,
Contracting Officer.

2 Form "I" Special.
Rochester District Ordnance Office.
PS.

EXHIBIT C.

To insure prompt attention in reply, refer to War Ord. AC-No. MG-48-A.

War Department,
Office of the Chief of Ordnance,
Procurement Division,
Washington.

"Suspension Request."

September 12, 1919.

avage Arms Corporation,
Utica, N. Y.

ENTLEMEN:

1. By direction of the Chief of Ordnance you are requested in the ublic interest immediately to suspend further operations under your ontract, or order, with the United States, War-Ord.-No. CMG-48-A, xcept such operations as may be necessary to complete delivery ereunder of a total (including all deliveries heretofore made) of 98,000 magazines together with their spare parts.

You are also requested, except for the purpose of completing such eliveries or in cases of proved necessity, to order no further materials r facilities, enter into no further sub-contracts, make no further ommitments, and incur no further expenses in connection with the erformance of said contract, or order.

2. This request is made with a view to the negotiations of a supplemental contract providing for the modification, settle-
3 ment and adjustment of your existing contract or order, in a manner which will permit of a prompt settlement.

3. Please acknowledge receipt of this notice immediately and in-icate your decision as to compliance with or rejection of this re-uest. Upon notice of your compliance, a representative of the rdnance Department will forthwith take up with you the proposed egotiation.

4. This supersedes all previous letters of suspension.

Respectfully,

(Signed) R. H. HAWKINS,
Lt. Col., Ord. Dept., U. S. A.

Form "I".
Rochester District Ordnance Office.
O. M. S.

EXHIBIT D.

Lt. Col. R. H. Hawkins, September 24, 1919.
Ordnance Department, U. S. A.,
Procurement Division,
Office of the Chief of Ordnance,
War Department, Washington, D. C.

Subject: "Suspension Request."

Reference: War Ord. A. C-No. CMG-48 A.

SIR:

1. Acknowledgment is hereby made of "Suspension Request" above referred to, bearing date September 12, 1919, substituted for incorrect Suspension Request dated January 29, 1919.

2. This Corporation has suspended work in accordance with said Request, reserving, however, all its rights against the United States Government, or any department or officer thereof, for failure
24 of the Government fully to perform all the provisions of the contract known as No. CMG-48A and especially its rights to recover all the profits which it would have made had it been permitted to complete said contract.

Respectfully, SAVAGE ARMS CORPORATION,
By W. L. WRIGHT,
President.

EXHIBIT E.

September 24, 1919.

Lanham Robertson,
Secretary Rochester District Claims Board,
82 St. Paul Street,
Rochester, N. Y.

Subject: Suspension of unfilled portion CMG-48A Contract.

Reference: (*a*) Unfilled Portion Represents 142,000 Extra Magazines for Lewis Machine Guns.

SIR:

1. We acknowledge herewith receipt of your "Suspension Request" dated September 12, 1919, on contract CMG-48A.

2. We enclose herewith acknowledgment of said request and announcement of our compliance therewith.

3. It is our understanding that under paragraph 5 of Supply Circular No. 111, your Board and the Army Ordnance Department will not authorize or make any settlement or payment to prime contractor on account of prospective profits. Will you kindly confirm this understanding, if correct.

Respectfully,

SAVAGE ARMS CORPORATION,
By W. L. WRIGHT,
President.

EXHIBIT F.

War Department,
Office of Ordnance District Chief,
82 St. Paul St.,
Rochester, N. Y.

September 26, 1919.

Savage Arms Corporation,
50 Church Street,
New York, N. Y.

Attention Mr. W. L. Wright, President.

Subject: Suspension of Contract CMG-48A.

GENTLEMEN:

Your favor of the 24th with enclosures received. Your understanding of paragraph 5 of Supply Circular 111 is correct.

ROCHESTER DISTRICT CLAIMS BOARD,
By LANHAM ROBERTSON,
Secretary.

EXHIBIT G.

October 20, 1919.

Mr. Lanham Robertson,
Secretary Rochester District Claims Board,
82 St. Paul Street,
Rochester, N. Y.

SIR:

Referring to our contract CMG-48A, upon which suspension request was first served January 29, 1919, and subsequently, in a corrected form, on September 12, 1919, we are and have been since the making of said contract willing and able to complete the entire quantity of 440,000 magazines specified therein.

We have offered verbally to accept the cancellation of the 142,000 magazines covered by the above mentioned suspension request on the basis that we be paid anticipated profits thereon.

We have had confirmed by your letter of September 26, 1919, the fact that the Claims Boards under the Ordnance Department have no jurisdiction to grant anticipated profits to a prime contractor. We, therefore, request you to inform us which of the following methods you propose to follow in disposing of this matter:

1. Take delivery of the suspended quantity of magazines.

2. Advise us that these magazines will not be taken under this contract.

3. Summarily cancel 142,000 magazines thereunder enabling us to present our case in the Court of Claims.

We believe we are justified in asking for action by your Board, without delay, as above specified.

Respectfully,

W. L. WRIGHT,
President.

27 EXHIBIT H.

Administration Division,

War Department,

Office of the Chief of Ordnance.

RHH-jg.

3727 Munitions Bldg.

Replying refer to A-C No. CMG-48-A.
Att.—Lt. Col. R. H. Hawkins.

November 17, 1919.

Savage Arms Corporation,
50 Church Street,
New York City, N. Y.

SIRS:

1. I am directed by the Chief of Ordnance to advise you that the United States will not accept or pay for 142,000 Magazines remaining undelivered under the terms of the Order designated War-Ord-CMG-48-A, dated April 30, 1918.

2. Under date of October 20, 1919, you addressed the Rochester District Claims Board—attention Mr. Lanham Robertson, Secretary—requesting the Ordnance Department to take delivery of these 142,000 magazines. The Small Arms Division of the Ordnance Department advises this Office, under date of November 14, 1919 (OMS. 160/366—O.O.167/60500), that the Ordnance Department cannot use these undelivered Magazines.

3. In the same communication of October 20, 1919, you stated that you will accept the Suspension Request submitted to you under

date of September 12, 1919, only upon the agreement of the Ordnance Department to pay you anticipated profits on the said
27½ undelivered 142,000 magazines. The Ordnance Department is not authorized to pay you any anticipated profits on account of such undelivered articles.

4. This is to advise you that the Ordnance Department will not accept the said undelivered 142,000 Magazines.

Respectfully,

R. H. HAWKINS,
Lt. Col. Ord. Dept., U. S. A.,
Contracting Officer.

28 II. *General Traverse.*

Filed Feb. 7, 1920.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. *History of Proceedings.*

On November 10, 1921, this case was argued and submitted on merits by Mr. Jesse C. Adkins, for plaintiff, and Mr. William F. Norris, for defendant.

On January 16, 1922, the Court handed down findings of fact, conclusion of law, and entered judgment dismissing the petition and also entered judgment against plaintiff in the sum of $534.90, for the cost of printing the record, with an opinion by Booth, J.

On March 15, 1922, the plaintiff filed a motion for a new trial and to amend findings of fact.

On May 2, 1922, the plaintiff's motion for a new trial and to amend findings of fact was argued and submitted by Mr. Jesse C. Adkins, for plaintiff, and Mr. W. F. Norris, for defendant.

On May 15, 1922, the Court entered the following order:

Order.

It is ordered by the Court that the plaintiff's motion to amend findings be and the same is allowed in part and overruled in part. The former findings are vacated, set aside and withdrawn and new findings this day filed. The judgment and opinion to stand.

By THE COURT.

29 IV. *Findings of Fact (as Amended May 15, 1922), Conclusion of Law, and Opinion of the Court by Booth, J.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is, and was during the different transactions set forth in these findings, a corporation duly incorporated under the laws of the State of Delaware, with its principal place of business in New York City, and a factory located at Utica, New York, devoted, during the war with Germany, exclusively to the manufacture of Lewis machine guns and spare parts therefor, including magazines.

The plaintiff had with the United States, including the contract in this case, 18 contracts for the manufacture and delivery of magazines for Lewis machine guns for the Army, Navy, and Marine Corps, under which it had actually delivered, up to and including June 20, 1919, 2,201,568 such magazines, the profits on which were $4,417,-546.98. The Government taxes paid on plaintiff's net profits during the year 1918 amounted to 66.3 per cent. There were also other large contracts for the manufacture and delivery of machine guns, small arms, and munitions of different kinds. The Government also expended, under a contract for increasing plaintiff's facilities, the sum of $2,850,000 for the erection of buildings and machinery, the title to which remained in the Government.

The numerous accounts relating to the various activities of the plaintiff in carrying out Government contracts were pending during the performance of the contract upon which this suit was brought.

II.

The plaintiff and the United States entered into a contract dated April 30, 1918, known as War Ordnance C. M. G. 48-A, a copy of which was filed as Exhibit A to the plaintiff's petition and is made a part of this finding of fact by reference thereto. There was another contract with the Savage Arms Corporation for 22,-000 Lewis aircraft machine guns, dated June 6, 1918 known as War Ordnance C. M. G. 48. The two had originally been one contract, but were finally separated.

The Savage Arms Corporation signed said contract, by W. L. Wright, vice president, and the United States by Samuel McRoberts, colonel, Ordnance Department, National Army, contracting officer, and Charles N. Black, lieutenant colonel, Ordnance Department, National Army. The name of Samuel McRoberts was signed in print and the names of W. L. Wright and Charles N. Black in their handwriting. At the time said contract was executed all such contracts were required to be signed by Samuel McRoberts, or in his name by Charles N. Black, or any one of four other designated officers of the Ordnance Department.

The oath required by section 3745 of the Revised Statutes was taken by Colonel Black on July 23, 1918.

By said contract, C. M. G. 48-A, the plaintiff agreed to manufacture and deliver to the United States, and the United States

greed to pay for certain spare parts for 22,000 Lewis machine guns. he only item of said contract involved in this suit is the one for 40,000 magazines for said Lewis machine guns, aviation type, for hich $4.24 each was agreed to be paid by the defendant.

III.

The plaintiff promptly entered upon the performance of its con-act, and while so engaged, entered into a supplemental contract ith the United States, dated January 13, 1918, regular in every rticular, by which the requirement for the manufacture and de-very of 22,000 shell deflectors contained in the contract of April , 1918, was canceled because it was a duplication of the same re-uirement in the contract of June 6, 1918, and the United States as released from all claims and demands arising out of or in con-ction with such cancellation. The said supplemental contract also ntained the following provision:

"Except as herein modified, all the terms and conditions of the id contract dated April 30, 1918, shall remain in full force and ect."

Attached to the said supplemental contract was a circular headed Additional terms and conditions," without address or signature, d to which no reference was made in said contract. Such cir-lars, beginning with October 20, 1918, were frequently attached procurement orders, purchase orders, and contracts, which some-nes referred to said circulars and sometimes did not.

Paragraph (*g*) of these circulars reads:

"If in the opinion of the Chief of Ordnance the public interest all so require, this order may be terminated by the United States at y time by notice in writing to the contractor from the contracting icer of the United States, and such termination shall be deemed be effective immediately upon the giving of such notice, or the ntracting officer may notify the contractor that any part or parts the articles, material, or work then remaining undelivered or performed shall not be manufactured, delivered, or performed."

IV.

Deliveries of magazines under contract C. M. G. 48-A calling for 0,000 magazines, began on September 28, 1918, and during the nths of September, October, and December 24,347 such maga-es were delivered.

Thereafter, on January 29, 1919, a notice was issued from the ice of the Chief of Ordnance (Procuration Division) at Wash-gton, signed by the contracting officer thereof and addressed to intiff at Utica, N. Y., as follows:

"1. By direction of the Chief of Ordnance you are requested in public interest immediately to suspend operations under your

contract, or order, with the United States, War-Ord. No. C. M. G. 48, to the extent of 298,000 magazines, together with their spare parts.

"You are also requested, except for the purpose of completing deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further subcontracts, make no further commitments, and incur no further expenses in connection with the performance of said contract, or order.

"2. This request is made with a view to the negotiation of a supplemental contract providing for the modification, settlement and adjustment of your existing contract or order, in a manner which will permit of a prompt settlement.

"3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation."

This notice was forwarded to the Rochester District Claims Board for delivery to plaintiff, and its purport having been communicated to plaintiff, an agent of the latter entered into verbal negotiations with an official of the claims board relative to the same. An understanding was arrived at between this agent and official to the effect that the order of suspension should operate to the extent of 142,000 magazines instead of the 298,000 stated in the notice. Thereupon plaintiff wrote under date of February 13, 1919, to the secretary of the said District Claims Board as follows:

"We have your letter of January 31st, inclosing suspension notice dated January 29th from Washington, covering the suspension of work on a certain quantity of magazines on War-Ord. C. M. G. 48. Our Mr. Phillips, from Utica, has discussed this matter with you, and it is understood that the suspension notice as received is not correct. We therefore await a change in the wording of this notice to correspond with the later instructions received at our Utica plant."

The plaintiff knew that the said notice of January 29, 1919, related to the contract for furnishing 440,000 magazines, designated in Finding II as C. M. G. 48-A. It was the only contract that called for the specific number 440,000. The contract designated as C. M. G. 48 for the manufacture of 22,000 Lewis aircraft machine guns had been completed on December 31, 1918.

It does not appear from the evidence what member of the District Claims Board informed plaintiff that the suspension notice of January 29, 1919, was incorrect and allowed it to manufac-
32 ture and deliver 298,000 magazines instead of 142,000. It does appear from the evidence, however, that the Rochester District Claims Board had no authority to change the suspension order of January 29, 1919.

The plaintiff never replied to the notice of the contracting officer at Washington of January 29, 1919, but took the suspension order

up with the District Claims Board, or some member thereof, instead. On August 1, 1919, the chief of the contract section of the Ordnance Department did not know that the suspension of the delivery of 298,000 magazines had been changed to 142,000. The District Claims Board, on July 18, 1919, requested the Chief of the Contract Section to issue an order of suspension against contract C. M. G. 48-A, but did not mention the change that had been made in the notice. In reply to this letter, the Chief of Ordnance, on August 1, 1919, notified the District Claims Board that he was willing to relieve the plaintiff from the manufacture and delivery of 298,000 magazines. There is nothing in the evidence to show that the Ordnance Office at Washington was ever informed of the change made in the suspension notice of January 29, 1919, until after the substitute suspension notice of September 12, 1919, was issued.

Before its letter of February 13, 1919, was written the plaintiff had stopped work on the 142,000 magazines, having received verbal instructions above mentioned to discontinue the manufacture of that number, although the written instructions stated 298,000.

The plaintiff, following its letter of February 13, 1919, proceeded to make further deliveries of magazines during the year 1919, as follows:

Feb. 15	9,600	Mar. 31	4,800
Feb. 17	14,592	Apr. 4	18,672
Feb. 20	13,146	Apr. 8	12,096
Mar. 5	13,344	Apr. 10	1,872
Mar. 8	12,432	Apr. 11	12,672
Mar. 13	14,400	Apr. 16	12,672
Mar. 15	14,400	Apr. 18	8,470
Mar. 19	14,400	Apr. 24	18,624
Mar. 21	14,400	Apr. 30	18,816
Mar. 24	14,400	Apr. 30	6,960
Mar. 24	4,000	May 7	4,485
Mar. 26	14,400		

until it had delivered 273,653, which, added to the number delivered prior to the suspension notice, 24,347, makes the 298,000 magazines which were delivered and paid for, the last payment having been made on May 21, 1919.

After completing said deliveries the plaintiff made no request to be allowed to furnish the 142,000 remaining of the whole number named in the contract. Thereafter some of the orders for materials were canceled, and some of the machinery for manufacturing said magazines was removed and the space occupied for other purposes.

At the time contract 48-A was pending the plaintiff had a large number of contracts with the Government, 18 for furnishing magazines, besides contracts for furnishing machine guns, small arms, and other munitions, and numerous accounts relating to such contracts. The plaintiff was therefore anxious to close this contract on its books, particularly so as there was some discussion going on among the

ordnance officials in Washington about what had become of
33 the suspension order of January 29, 1919, and a possibility, when the unauthorized changes became known, of charging back 156,000 magazines (the difference between 142,000 and 298,000) against the plaintiff as having been improvidently accepted and paid for.

The plaintiff, with this end in view, wrote a letter dated July 8, 1919, to the secretary of the Rochester District Claims Board, which reads:

"Reference: (*a*) Unfilled Portion Represents 142,000 Extra Magazines for Lewis Machine Guns.

"DEAR SIR:

Referring to the writer's conversation with you over the long-distance telephone this afternoon, if you have not already done so we will thank you to make immediate arrangements to make application to Col. R. H. Hawkins, chief of the contract section, Administration Bureau, Washington, for suspension request to be sent to us through your office, terminating the above-mentioned C. M. G. 48-A contract, on which there are now due to the Government the quantity of 142,000 extra magazines for Lewis machine guns.

"Upon receipt of this suspension request we hereby agree to immediately accept it without making claim for any portion of the 142,000 magazines so suspended.

"By reason of change in design in the magazine furnished under this contract, we, the contractor, sustained a substantial loss of profit by reason of lost production, and inasmuch as this contract will have been suspended upon acceptance of the above-mentioned suspension request, we will then accordingly file our claim for recovery of this lost profit."

The change in design referred to in the above letter was made in June, 1918, under article 2 of the contract, and provided Veeder counter indicators and dust covers for the magazines for Lewis machine guns.

On July 10, 1919, without awaiting a reply to its said letter of July 8, 1919, the contractor filed with the Rochester District Claims Board a claim in entire accordance with the statement of said letter of July 8, stating its claim at the sum of $181,213.27, alleged to be on account of lost production of magazines under contract C. M. G. 48 and C. M. G. 48-A, due to change in design of same. This claim was disallowed by the board, the grounds of disallowance not being shown by the record.

The plaintiff also presented another claim growing out of said change in design of the magazines. It was the cost of making and attaching the Veeder counter indicators and dust covers and the prices were agreed upon by the Government and the plaintiff at 9 cents each for the counters and 8 cents each for the dust covers, aggregating $26,711.03, which was paid on November 12, 1919.

After writing the letter of July 8, 1919, the plaintiff persistently and repeatedly urged the officials of the ordnance office to revise the suspension order of January 29, 1919, by an order authorizing the delivery of 298,000 magazines.

A letter from the plaintiff, signed by Mr. Barker, and addressed to Mr. Horton, dated August 20, 1919, reads:

"DEAR MR. HORTON:

Referring to the writer's conversation with you under date of August 14th, 1919, this will confirm the fact that there remains undelivered on the above-mentioned contract 142,000 magazines for Lewis machine guns.

34 "As we have received and accepted no suspension request for this number, it will be appreciated if you will have forthcoming suspension request for our acceptance in termination of this contract.

"Some time ago we received verbal instruction of the Rochester district office to discontinue the manufacture of these magazines, as they were not wanted. So that there will be no misunderstanding, we are anxious to receive and accept suspension request, otherwise the contract will remain open on our books."

Finally, a verbal agreement was arrived at between Mr. Barker, representing the plaintiff, and Mr. Horton, representing the defendant, by which the plaintiff agreed to abandon and settle all claims, controversies, and disputed points growing out of contract 48-A if Mr. Horton would secure a revision of the "suspension order" of January 29, 1919, so as to allow the delivery of 298,000 magazines instead of 142,000.

Mr. Horton performed his part of the agreement, and as the result of his efforts the suspension order dated September 12, 1919, was issued, addressed to plaintiff by direction of the Chief of Ordnance, and signed by Lieutenant Colonel Hawkins, of the Ordnance Office. The order reads:

"1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend further operations upon your contract, or order, with the United States, War-Ord. No. C. M. G. 48-A, except such operations as may be necessary to complete delivery thereunder of a total (including all deliveries heretofore made) of 298,000 magazines together with their spare parts.

"You are also requested, except for the purpose of completing such deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further subcontracts, make no further commitments, and incur no further expenses in connection with the performance of said contract or order.

"This request is made with a view to the negotiations of a supplemental contract providing for the modification, settlement, and adjustment of your existing contract or order in a manner which will permit of a prompt settlement.

"3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance a representative of the Ordnance Department will forthwith take up with you the proposed negotiation.

"4. This supersedes all previous letters of suspension."

All questions of the deduction of payments for the 156,000 magazines delivered in excess of the order of January 29, 1919, having been settled, the plaintiff, by letter dated September 24, 1919, acknowledged the receipt of the order of September 12, as follows:

"1. Acknowledgment is hereby made of 'suspension request' above referred to, bearing date September 12, 1919, substituted for incorrect suspension request dated January 29, 1919.

"2. This corporation has suspended work in accordance with said request, reserving, however, all its rights against the United States Government, or any department or officer thereof, for failure of the Government fully to perform all the provisions of the contract known as No. C. M. G. 48-A and especially its rights to recover all the profits which it would have made had it been permitted to complete said contract."

Thereafter the plaintiff wrote several letters to the office of the Chief of Ordnance, making inquiry as to the intention of the Government regarding the delivery of the remaining 142,000 magazines, or the payment of prospective profits on its refusal to receive such magazines, to which the Chief of Ordnance finally, on November 17, 1919, replied that the Government could not use and would not accept delivery of the remaining 142,000 magazines, and that he was not authorized to pay anticipated profits on such magazines.

V.

When the notice of suspension of January 29, 1919, was received in February, the plaintiff was in the midst of the performance of its contract, and was at the height of its production, making 5,000 magazines a day, and was in a condition to have performed its entire contract without difficulty.

VI.

On the 298,000 magazines manufactured and delivered under the contract of April 30, 1918, the plaintiff made an average profit of $2.007 each, or a total profit of $598,086. If the plaintiff had completed its contract it would have made a profit of $284,994 on the remaining 142,000 magazines.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff company on April 30, 1918, entered into a written agreement with the defendant to supply, among other things, 440,000 magazines, to be used by the defendant in connection with Lewis machine guns. The contract was made during the war with Germany, and was one among several others obligating the plaintiff to furnish the defendant with arms and munitions of war.

On January 29, 1919, following the armistice, the defendant notified the plaintiff in writing that it would suspend the contract to the extent of 298,000 magazines, and invited negotiations for a supplemental contract looking toward a prompt adjustment and settlement of contract rights. The plaintiff company, for some reason, contended that the suspension notice was erroneous and should not have been for the total number of 298,000 magazines. An alleged verbal conversation, and one or more over the telephone with the officers of the defendant, members of the Rochester District Claims Board, located at Rochester, N. Y., according to its version of
36 the affair resulted in a verbal statement that the suspension order was construed by them as not intended to extend further than 142,000 magazines. The plaintiff wrote the Rochester District Claims Board on February 13, 1919, stating that the suspension order was erroneous, and asking for a corrected suspension in accord with its verbal understanding, a matter over which it had no jurisdiction. As a result of this misunderstanding a considerable correspondence ensued and considerable time elapsed before the negotiations culminated in a settlement. In the meantime the plaintiff proceeded with the manufacture of magazines and did not suspend until May 7, 1919, when it had completed and delivered, and on May 21, 1919, received payment for 298,000 magazines, notwithstanding the fact that its letter of February 13, 1919, had not been answered, and that no correction of the suspension order of January 29, 1919, had been obtained. No competent evidence discloses any authorized amendment or correction of the suspension order of January 29, 1919, nor can we find in the record who gave it or what its exact terms, were, other than that 142,000 was the number to be substituted for 298,000 magazines. Thus we find the plaintiff acting upon a verbal modification of a written order of suspension extending expressly to 298,000 magazines, manufactur-

ing, delivering, and receiving payment for the identical number it had been notified to suspend, and making but one feeble effort to have the verbal modification put in writing, until a date subsequent to the time when said magazines had been delivered and paid for. The plaintiff's attitude then, at this stage of the proceedings, as shown by the record, was simply this: We received a written order to suspend the manufacture of 298,000 magazines. We communicated with the defendant and it was verbally agreed that we might furnish 298,000 magazines and suspend 142,000. We furnished the 298,000; the defendant paid for them. We then in January did suspend the 142,000. We made no effort to manufacture or deliver the same, but on the contrary specifically asked for and agreed to accept a suspension order for the 142,000.

Why do we say this? Because the inference is irresistible. After the plaintiff had completed the manufacture and delivery of the 298,000 magazines and been paid therefor, its officers realized that this transaction had been closed upon the bare, uncertain authority of a verbal order, and therefore it was persistent and energetic in its efforts to have this past transaction officially and expressly closed by the proper authority, so that in no event could the large sums of money it had received thereunder be checked against other sums due the plaintiff under other contracts, aggregating millions of dollars.

This view of the situation is expressly confirmed and substantially put at rest by the letter of July 8, 1919, written by the plaintiff to the Rochester District Claims Board, wherein the plaintiff in positive terms expressly agrees to waive all claims for any portion of alleged damages due to the suspension of 142,000 magazines, if the officer addressed will "make immediate arrangements * * * for suspension request to be sent to us through your office terminating the above-mentioned C. M. G. 48–A contract." This letter of July 8, 1919, was the result of a verbal agreement between the plaintiff and the officers of the Rochester District Claims Board, subsequently ratified and confirmed by the Chief of Ordnance of the War Department at Washington. The history of this transaction alone
37 is sufficient to determine the case adversely to plaintiff's contention. The plaintiff had suspended the manufacture of 142,000 magazines, a conference as to its claims had taken place between its representatives and the officers of the Rochester District Claims Board, where the plaintiff's representatives talked over the possibility of a claim for profits on the 142,000 magazines suspended, and at the same time a claim for a large sum of money due to a change in design of the magazines made during the course of manufacture. This claim embraced a charge for an alleged "lost production," a damage due to a slowing down of production caused by the addition to the magazines of Veeder counter indicators and dust covers. It was not confined alone to the number of magazines manufactured under contract C. M. G. 48–A, but by its own terms included 16,661 magazines delivered under contract C. M. G. 48. The total amount claimed is $181,213.27, arrived at by charging a certain percentage of overhead expenses against the manufacture of 314,661 magazines, or 16,661 in excess of those delivered under contract C. M. G. 48–A.

The officers of the Rochester District Claims Board declined to consider any claim for lost profits, at the same time representing to the plaintiff that pursuit of a claim for profits in the United States Court of Claims involved a period of time extending for at least half a century, an interminable controversy, with no hope of immediate redress, and the plaintiff, without investigation, however preposterous the statements were, accepted the same, and expressly agreed that the allowance of the claim for lost production would be accepted by it in full of all claims and demands whatsoever growing out of the suspension of the manufacture and delivery of the 142,000 magazines then undelivered. The above claim was mailed to the Rochester District Claims Board July 10, 1919, and received July 12, 1919. This most remarkable transaction, though finally culminating in the disallowance of the claim as presented, remains a most potent factor in depicting the attitude of the plaintiff toward a settlement of differences with the defendant, another step toward the procurement of an authenticated suspension order for 142,000 magazines, and an express approval of what had been done under its contract. The transaction itself was quite unique, the plaintiff agreeing to balance one claim against another, both of substantially the same character, inasmuch as both involved anticipated profits. The contract in express terms authorized changes in the specifications and design of the articles to be furnished, and provided a method of payment therefor. There was little or no room for dispute, yet we find the plaintiff company presenting a disputatious claim under this very article of the contract, totaling a sum far in excess of the compensation afterwards agreed upon, and making it the basis of a composition, which would in the end reimburse it for very close to the amount it now claims as anticipated profits on the undelivered 142,000 magazines. Stranger still, while this very claim is pending and undisposed of, negotiations are going forward looking toward an agreement for the payment of the cost of the change in specifications and design—the change involved in the large claim presented, and the only one made in the contract—which finally results in the allowance to plaintiff of the sum of $26,711.03, which amount the plaintiff accepted, after the formal disallowance of its item for lost production or increased overhead expenses, to wit, November
38 12, 1919. What reason there was for a division of this particular claim is explainable only upon the hypothesis that the plaintiff anticipated thereby the securement of the suspension agreement, the approval of its course in manufacturing the 298,000 magazines in the face of an express suspension order for that number, and effectually closing the transaction against the possibility of a checkage against the 156,000 magazines manufactured and delivered in excess of those suspended, as well as a means of invoking the jurisdiction of the Rochester District Claims Board upon a claim which it considered within its jurisdiction, and facilitating its allowance by a proposition to forego all other claims—of which the board had no jurisdiction—if the exact amount claimed would be allowed. Having failed to reach a final adjustment in the method described above,

the plaintiff, still extremely anxious to close the transaction, approached Mr. Horton, and on August 20, 1919, wrote the letter set forth in Finding IV. In this letter the failure to receive the corrected suspension order is again stressed, and the language of the same clearly and unmistakably indicates its acceptance is to be treated as a termination of the contract. Negotiations follow, and the course of the negotiations, together with the final result, and the acceptance of the $26,711.03, disclose an agreement, express and beyond doubt, to close the differences between the parties upon the basis agreed upon. The confirmation of this final agreement does not rest wholly on parol evidence, for in accord with what was admittedly said by the respective parties, appears the written suspension order of September 12, 1919, from the Chief of Ordnance in Washington, wherein the number suspended is given as 142,000 magazines instead of, as in the original order of January 29, 1919, 298,000 magazines. The effect of this was an authenticated acceptance of the 298,000 magazines theretofore delivered, and for which the defendant had no use whatever. The fact that for a period of nine months negotiations had been pending; that during all this time the defendant did not alter, modify, or change the original suspension order, notwithstanding the insistence of the plaintiff that it was erroneous, and especially in view of the fact that the Ordnance Office at Washington did not concur in this contention, coupled with the final change, corroborates with indisputable force the fact that there was an express agreement to close the transaction on the basis of the acceptance without question of the 298,000 magazines, the payment for the change in design, in consideration of which the plaintiff agreed to waive all claims for prospective profits, and close the transaction on its books.

This change in the order, whereby the plaintiff proceeded to make and deliver 298,000 magazines instead of 142,000, was acted upon by the plaintiff without any kind of objection on its part. It not only suspended any manufacture of any part of the 142,000 magazines prior to its letter of February, but after completing the 298,000 and being paid therefor in full, the plaintiff did not at any time ask to be allowed to make or deliver the balance of the magazines. It desired, for manifest reasons, to close the matter on its books, and it asked for a corrected suspension order looking to that end. Its entire action showed not only a willingness, but a purpose, to accept the modified order and to acquiesce therein. It must be held to have agreed to the modification of the contract to the extent, at
39 least, that it would not expect to manufacture or insist upon a right to manufacture and deliver the 142,000 magazines. Having thus accepted the modification of the contract, it can not recover the prospective profits now claimed. The right to recover prospective profits involves a breach by one party of the contract, while there is a readiness and willingness of the other party to perform; but where it is agreed that there shall be a partial performance, manifestly there can be no recovery of the profits that would have been earned if the performance had been complete.

It is elementary; we need not cite authorities to sustain the proposition that where a contractor under obligation to furnish a stated quantity of article finds his contract canceled and subsequently negotiates for the delivery and acceptance of a less quantity than originally intended, accepts payment therefor and a modification order in accord with the agreement he can not then assert a claim for the undelivered balance. The position of the parties has been materially changed. The contractor must stand upon his legal rights under the original cancellation order; he can not abandon them and enter upon the performance of the agreement in accord with the accepted changes, and at the same time assert the binding force of the original contract. Two avenues of redress were open to the contractor in the first instance, and the right of election was his. He might choose the course which in the end entailed the least loss, and induce the other partly to accept a part performance in lieu of a total or partial breach, or he might treat the contract as at an end and sue for damages He can not accept one remedy without losing the other.

On September 24, 1919, for the first time, we find a written reservation of the plaintiff's alleged claim for prospective profits on the 112,000 magazines undelivered. It at once arouses an extremely pertinent inquiry. Why this belated assertion of a claim which in all the correspondence between the parties—set forth in the finding—is not once reserved or treated in any other fashion than an unconditional surrender? We would dislike to indulge the inference that during this long period of time this particular claim was employed as a potent instrumentality to extract from the defendant a settlement advantageous to the plaintiff's securing a final and complete adjustment of its business transactions with the defendant under its contract, and after having served its purpose in this respect appear again as an assertion of a separate and distinct liability. The officers of the defendant, beyond the peradventure of a doubt, believed and treated it as settled in the agreement made. The correspondence of the plaintiff, in every letter and in every request, expressly mentioned its existence and agreed expressly to accept the suspension notice for 142,000 magazines without qualification or reservation. As late as August 20, 1919, the plaintiff wrote the defendant to this effect, as set forth in Finding IV.

Language so exact and often repeated is not susceptible to doubt and misunderstanding. The plaintiff had many and very extensive contracts with the defendant. It must have known the effect of its correspondence and the words it used.

The president of the plaintiff company was evidently not familiar with the negotiations between the company and the defendant, prior to September 12, 1919. On September 24 he acknowledged in writing the receipt of the modified suspension order and very innocently inquired as to whether the Rochester District Claims Board had jurisdiction to settle and pay a claim for prospective profits, a question which had long since been answered by the board to the company's accredited representative and about which no one actively connected with the transaction had the slightest doubt.

The board on September 26, 1919, promptly notified the plaintiff that it had no jurisdiction of a claim for prospective profits, in answer to which the president of the company manifested an entire unfamiliarity with the transaction, for he therein stated that the plaintiff had offered verbally to accept the notice of cancellation of the contract C. M. G. 48-A on the basis of payment of anticipated profits thereon. The record is directly contrary to this assertion. No claim for anticipated profits on the 142,000 magazines was ever filed with any department of the Government, at any time, by any person, and the only verbal conversations shown by the record with reference thereto, except the talk with Colonel Crane, was the inclusion of all outstanding claims in the agreement made between the plaintiff and Colonel Horton. The only reason we can ascribe for the three last inquiries addressed to the board is an utter lack of knowledge of what had taken place. The plaintiff never attempted to deliver the 142,000 magazines; on the contrary, it is expressly asserted that their manufacture was suspended prior to February 13, 1919. The contract had already been formally canceled, and many months before formally suspended. The plaintiff's dealings with the Rochester District Claims Board had but recently been formally closed; it knew from a long course of daily contact with the board the extent of its authority and the detail of procedure, and the utter absurdity of repeating a situation which had been the subject of controversy for nearly ten months may be explained on the basis that the official of the plaintiff indulging the same was not fully informed with respect thereto. Otherwise we would be forced into the conclusion that the whole subject matter of the correspondence was intentionally delayed until the plaintiff had escaped all danger of controversy and trouble over its prior transactions, or was an afterthought upon which the company might hazard a claim for a large sum of money.

The petition will be dismissed. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

41 IV. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 15th day of May, A. D. 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the Savage Arms Corporation, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed; And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the Savage Arms Corporation, as aforesaid, the sum of Five hundred and thirty-four dollars and ninety cents ($534.90), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

V. *Plaintiff's Application for and Allowance of Appeal.*

From the judgment rendered in the above entitled cause on the fifteenth day of May, 1922, in favor of the defendant, claimant by its attorney on June twenty-ninth, 1922, makes application for and gives notice of an appeal to the Supreme Court of the United States.

JESSE C. ADKINS,
Attorney for the Claimant.

JOHN H. ISELIN,
FRANK F. NESBIT,
Of Counsel.

Filed June 29, 1922.
Ordered: That the above appeal be allowed as prayed for.
June 29, 1922.

By THE COURT.

42

Court of Claims.

No. 34234.

SAVAGE ARMS CORPORATION

vs.

THE UNITED STATES

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and Opinion of the Court by Booth, J.; of the judgment of the Court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this First day of July, A. D. 1922.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 29,027. Court of Claims. Term No. 477. Savage Arms Corporation, appellant, vs. The United States. Filed July 10th, 1922. File No. 29,027.

FILED
SEP 25 1924
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 13.

SAVAGE ARMS CORPORATION, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

BRIEF FOR APPELLANT.

JESSE C. ADKINS,
JOHN H. ISELIN,
FRANK F. NESBIT,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OCTOBER TERM, 1924.

No. 13.

SAVAGE ARMS CORPORATION, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims against appellant.

The case involves the right of appellant, hereinafter called plaintiff, to recover profits on a contract with the United States. The contract was for the manufacture of spare parts for Lewis machine guns. The case concerns but one item—for 440,000 magazines. The contract contained no provision authorizing the Government to cancel it.

After the armistice the Government sent plaintiff a letter requesting it to suspend manufacturing operations as to 298,000 magazines with a view to the negotiation of a modification or settlement contract. Plain-

tiff reached an understanding with officers of the Government that the request should operate as to 142,000 magazines and as to that number complied with the request to suspend. It manufactured and delivered the balance, or 298,000 magazines. Government officials inspected and received them, and paid the full contract price therefor; but later refused to receive the 142,000 magazines as to which operations had been suspended during negotiations.

Plaintiff was at the height of its production and in condition to have performed the entire contract without difficulty. Its profits on the 142,000 uncompleted magazines would have been $284,994 (Findings V and VI, p. 28).

The 298,000 magazines were delivered in strict accord with the contract. The letter requesting suspension recognized the Government's obligations under the contract, and did not repudiate or cancel that contract or justify plaintiff in treating it as a breach. The letter had no effect on or relation to the completed magazines.

The Court refused judgment for plaintiff for the amount of its profits, proceeding on the theory that plaintiff had compromised its right thereto.

The only circumstance suggested as a consideration for the alleged surrender by the plaintiff was a letter written months after the delivery of and payment for the 298,000 magazines, which letter was to be a revision of the original request to suspend "so as to allow the delivery of 298,000 instead of 142,000" (27).

In fact there was no compromise between the parties. No dispute had arisen between them as to the delivery of the 298,000 magazines; that delivery was never ques-

tioned by the United States or by any officer thereof; and there was no ground upon which it could be questioned or upon which a colorable dispute could be founded. There being no actual dispute between the parties and no ground for dispute, there could be no settlement of a dispute and there was no surrender of a right by the United States. Hence there was no consideration to support a compromise.

This Court has held that the findings of fact of the Court of Claims are controlling, and that this Court is not at liberty to refer to the opinion of the Court of Claims "for the purpose of eking out, controlling, or modifying the scope of the findings. Stone v. U. S., 164; U. S., 380, 383; Crocker v. U. S., 240 U. S. 74, 78."

The facts found by the Court of Claims do not justify its judgment, but do require that judgment be entered for plaintiff in the full amount of its profits.

THE FACTS.

Plaintiff is a manufacturing corporation with a factory at Utica, New York, which during the war was devoted to the manufacture of Lewis Machine Guns and spare parts therefor, including magazines (Finding I, p. 22). The contract in suit is dated April 30, 1918, and is known as War Ordinance CMG 48 A (II, 22). A copy is Exhibit A to the petition (5-15, Finding II). There was another contract between the same parties, known as CMG 48. It was for 22,000 Lewis aircraft machine guns, while 48A was for spare parts. In their inception the contracts were negotiated together, but were executed separately (II, 22).

The only item of Contract 48A here involved is 440,000 magazines, the agreed price for which was $4.24

each (II, 23). The contract contained no provision for cancellation on the part of the Government.

The rights and obligations of the parties were plain. Plaintiff was obliged to manufacture and deliver, and the Government to accept and pay for all the magazines.

When the suspension request was received plaintiff was in the midst of performance of its contract, was at the height of its production, and was in condition to have performed its entire contract without difficulty. It did deliver 298,000 magazines, all of which were accepted and received by May 7, 1919, and all of which were paid for by May 21, 1919. Had it been permitted to complete its contract and deliver the remaining 142,000 magazines, it would have made a profit thereon of $284,994 (Findings V, VI, p. 28; Finding IV, p. 25).

In the territorial division of the work of the War Department there was at Rochester, N. Y., an office known as the Rochester District Claims Board. Communications with the Ordnance Office of the War Department apparently were carried on through the Rochester Board. Under date of January 29, 1919, an officer of the Ordnance Office at Washington addressed a polite letter to plaintiff, requesting it to suspend operations under its contract CMG 48 to the extent of 298,000 magazines (Finding IV, p. 23). This is not the contract in suit, but the Court found that plaintiff knew it related to such contract.

The request stated that it was made with a view to the negotiation of a supplemental contract providing for the modification, settlement and adjustment of plaintiff's existing contract. Plaintiff was asked to acknowledge receipt immediately and to indicate its

decision as to compliance with or rejection of the request, and informed that on "notice of compliance a representative of the Ordnance Office would forthwith take up with you the proposed negotiation" (24).

The letter is in the following language (23, 24):

> "1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend operations under your contract, or order, with the United States, War-Ord. No. C. M. G. 48, to the extent of 298,000 magazines, together with their spare parts.
>
> "You are also requested, except for the purpose of completing deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further sub-contracts, make no further commitments, and incur no further expenses in connection with the performance of said contract or order.
>
> "2. This request is made with a view to the negotiation of a supplemental contract providing for the modification, settlement and adjustment of your existing contract or order, in a manner which will permit of a prompt settlement.
>
> "3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation."

Instead of sending this letter directly to claimant, it was forwarded to the Rochester Board. Its purport was communicated to plaintiff. An agent of the latter and an official of the Claims Board arrived at an understanding that this letter should operate to the extent of 142,000 magazines instead of 298,000 (24). There-

upon on February 13, 1919, plaintiff wrote the Board acknowledging the latter's letter transmitting the suspension request. Plaintiff said it understood the suspension request as received was not correct, and announced that it awaited a change in the wording of the notice to correspond with the later instructions received at the Utica plant (24).

While the Court below refers indiscriminately to the letter of January 29 as an order, notice, letter and request, it purported to be, and was, and was taken to be a *request* to suspend operations and to negotiate a formal written settlement contract. It was not a notice of intention on the Government's part not to perform and was not a breach of the contract. It was not an order of any kind, and was not a cancellation.

No reply was received to plaintiff's letter of February 13. Plaintiff did suspend operations as to 142,000 magazines. It manufactured and delivered in addition to those theretofore delivered, 273,653, or a total of 298,000 magazines (25).

These magazines were delivered between February 15 and May 7, 1919, and were promptly paid for by the United States, the last payment being made May 21, 1919 (25).

Thus a contract to deliver and to receive 440,000 magazines was completely performed to the extent of 298,000 only. That number was manufactured, delivered, found to accord with the specifications, and paid for. Under the contract the payment could only be made upon the certificate of the inspecting and receiving officer, showing delivery and acceptance (p. 12, par. 3).

To that extent each party to the contract had met its obligations and been accorded its rights. To that ex-

tent the request to suspend was not material. Indeed, had the Government continued to receive and pay for the remaining magazines, the plaintiff would have been not only within its rights, but in the performance of its obligations in continuing to manufacture and deliver to the full extent of 440,000 magazines.

The request to stop work beyond a certain point and to negotiate a settlement contract was a mere invitation from defendant to plaintiff. Unless plaintiff accepted that invitation, it could play no part in the case. And plaintiff might accept it as to the entire amount covered by it or only as to part thereof.

The request to suspend could not of itself affect the contract, nor could it constitute a breach of the contract by the Government. It was clearly not a notification that defendant would not accept further deliveries. The request did not create any obligation whatever on plaintiff's part to comply with it.

But so long as plaintiff continued to manufacture and deliver, it was performing its contract obligations. And so long as the Government continued to receive and pay for the articles, the Government was performing its contract obligations.

The United States made no claim that the delivery was illegal or improvident, or that it was not allowed by the letter of January 29, or that any of the magazines could be charged back to plaintiff. In short, it raised no question, controversy or dispute as to that delivery. And as to that delivery, there was nothing for it to compromise with plaintiff.

The Court then finds:

> "At the time contract 48-A was pending the plaintiff had a large number of contracts with the

> Government, 18 for furnishing magazines, besides contracts for furnishing machine guns, small arms, and other munitions, and numerous accounts relating to such contracts. The plaintiff was therefore anxious to close this contract on its books, particularly so as there was some discussion going on among the ordnance officials in Washington about what had become of the suspension order of January 29, 1919, and a possibility, when the unauthorized changes became known, of charging back 156,000 magazines (the difference between 142,000 and 298,000) against the plaintiff as having been improvidently accepted and paid for."

The Court then quotes a letter dated July 8 to the Secretary of the Rochester Claims Board which calls attention to the fact that there are still due the Government on contract 48-A 142,000 magazines.

As stated in the letter, plaintiff on July 10, filed with the Rochester Board a claim for $181,213.27, alleged to be on account of lost production of magazines due to a change in their design. The letter of July 8 states that this claim will be filed and that if it is allowed the plaintiff will make no claim for any portion of the 142,000 magazines so suspended. The claim for $181,213.27 was disallowed by the Rochester Board and the proposition contained in the letter of July 8 thus came to an end (26).

The Court then continues that after this letter the plaintiff urged the ordnance officials to revise the letter of January 29 "by an order authorizing the delivery of 298,000 magazines" and that on August 20th Mr. Barker wrote a Mr. Horton that there remained undelivered under this contract 142,000 magazines for which no suspension request had been received and he asked that one be sent.

The letter says not a word about the 298,000 magazines and it is not asked that their delivery be "authorized."

The Court then proceeds to its finding of the ultimate fact upon which its conclusion of law is based. It continues:

> "Finally a verbal agreement was arrived at between Mr. Barker, representing the plaintiff, and Mr. Horton, representing the defendant, by which the plaintiff agreed to abandon and settle all claims, controversies, and disputed points growing out of contract 48-A if Mr. Horton would secure a revision of the suspension order of January 29, 1919, so as to allow the delivery of 298,000 magazines instead of 142,000." (27)

This "verbal agreement" is the foundation for the Court's conclusion of law that judgment should go against plaintiff.

The Court continued that as a result of Horton's efforts a letter dated September 12, 1919, signed by Lieut. Col Hawkins of the Ordnance Office was sent plaintiff. This letter is an exact copy of that of January 29, except that the first paragraph requests plaintiff to suspend further operations upon its contract 48-A (instead of 48) "except such operations as may be necessary to complete delivery thereunder of a total (including all deliveries heretofore made) of 298,000 magazines" (27).

The letter then states, in the language of the first letter, that the request is made with a view to the negotiation of a supplemental contract for the settlement and adjustment of the existing contract; plaintiff is requested to acknowledge receipt and indicate its

decision as to compliance with or rejection of the request, and is informed that upon notice of its compliance a representative of the Ordnance Department will forthwith take up with it the proposed negotiation. The letter adds that it supersedes all previous letters of suspension.

As would naturally be expected from this letter, the plaintiff on September 24, 1919, replied acknowledging the receipt of the request last mentioned "substituted for suspension request dated January 29, 1919," and stated that it had suspended work in accordance with the request, reserving, however, all its rights, against the government for failure fully to perform the contract and especially its rights to recover all the profits it would have made upon such completion (28).

Thereafter plaintiff wrote several letters to the Chief of Ordnance inquiring as to the government's intention regarding the remaining 142,000 magazines or the payment of prospective profits on its refusal to accept them. Finally, on November 17, 1919, the Chief of Ordnance replied that the government could not use and would not accept the magazines, and that he was not authorized to pay anticipated profits on them (28). This letter was a peremptory refusal by the defendant to perform the contract.

The gist of the Court's findings of facts is the alleged "verbal agreement." In discussing that agreement the Court proceeds on the theory that plaintiff compromised its rights to the $284,994 profits on 142,000 uncompleted magazines. The only circumstance suggested as a consideration for this compromise is a letter which was to be written months after the delivery

of the 298,000 magazines, which letter was to allow their delivery.

A fundamental prerequisite to a compromise is an actual dispute between the parties made in good faith and based upon reasonable or colorable grounds. To support the supposed compromise, it must appear that the United States actually made some claim against plaintiff with respect to the completed deliveries of the 298,000 magazines; that in good faith the Government believed its claim to be valid, and that it was valid or was based upon reasonable or colorable grounds.

We have quoted the only facts found by the Court bearing on the subject. They do not show that any claim was made by the United States as to the 298,000 magazines.

The finding merely is that some discussion was going on among the ordnance officials in Washington about what had become of the suspension order of January 29. This cannot be distorted into a finding that the ordnance officials honestly believed the deliveries were improper, or that they had made any claim to plaintiff. They were merely inquiring among themselves what had become of the latter.

The only other item in the finding is the alleged "possibility" of charging back some of the magazines against plaintiff as having been improvidently accepted. Whether it was possible to charge back any of these magazines on this ground is purely a question of law. As we show hereafter, upon the ultimate facts found by the Court it was not legally possible to charge any of the magazines back to plaintiff. This language of the Court, dealing with a question of law, is entirely inappropriate to findings of fact.

The discussion going on among the ordnance officials at Washington was not communicated to plaintiff, nor did the officials discuss or consider the "possibility" referred to. It is clear from the facts that no officer of the Government ever regarded as improper the delivery of any part of the 298,000 magazines, and that no officer of the Government ever imagined to himself or presented to plaintiff any claim that the magazines could be charged back, or understood that it had any right or claim to compromise with respect to those magazines or ever understood that it had compromised with plaintiff any such right or claim.

142,000 magazines had been delivered before the end of March. The next 156,000 were delivered between that time and May 7. In all the negotiations and correspondence it is never hinted that the Government believed there was any question about these deliveries or that it had the right to question them or that it had surrendered any such right. When the letter of September 12 was received, plaintiff agreed to suspend, but insisted on its right to profits. The Ordnance Office replied and finally breached the contract, but never made the point that a compromise agreement had been made by which plaintiff had surrendered its right to profits as a consideration for the Government's surrender of a right to question the delivery of any magazines.

ASSIGNMENT OF ERRORS.

The Court below erred:

1. In entering judgment for the defendant and in failing to enter judgment for the plaintiff for the amount of its profits.

2. In holding that the facts found by the Court justified judgment for the defendant.

3. In holding that there was a valid agreement between plaintiff and defendant by which the ~~defendant~~ plaintiff surrendered its right to its anticipated profits, when the facts do not show such valid agreement.

4. In entering judgment for defendant on the theory that a compromise had been made by which the defendant surrendered some right as to the completed deliveries of 298,000 magazines, when in fact there was no actual dispute between the parties as to those deliveries and no ground on which to base a dispute.

ARGUMENT

I. THE COURT BELOW PROCEEDED ON THE THEORY THAT PLAINTIFF LOST ITS RIGHTS TO ANTICIPATED PROFITS UNDER AN AGREEMENT BETWEEN IT AND DEFENDANT BY WHICH THE GOVERNMENT COMPROMISED AND SURRENDERED SOME RIGHT WITH RESPECT TO THE 298,000 MAGAZINES THERETOFORE DELIVERED, ACCEPTED AND PAID FOR.

A BONA FIDE DISPUTED CLAIM IS ESSENTIAL TO A VALID COMPROMISE. THE GOVERNMENT IN FACT MADE NO CLAIM AS TO THE 298,000 MAGAZINES AND HAD NO FOUNDATION FOR ONE.

HENCE IT COMPROMISED NOTHING AND SURRENDERED NOTHING TO PLAINTIFF AND THE ALLEGED AGREEMENT WAS WITHOUT CONSIDERATION.

The findings of fact proceed on the theory that there was a compromise between the parties by which

defendant surrendered to plaintiff something with respect to the magazines which had already been delivered, and plaintiff in turn surrendered its undoubted right to profits aggregating $284,994.

It is an essential condition of a compromise that there be an actual dispute between the parties, and the claim in dispute must be made in good faith and based upon colorable or plausible grounds. In the present case there was never any dispute as to the 298,000 magazines. They had been manufactured and delivered in strict accord with the contract and paid for under its terms. Defendant never questioned the validity or propriety of that performance nor claimed that it could rescind that delivery. If no claim at all was made by defendant, none was made in good faith and based upon colorable or plausible grounds. There was no foundation upon which such a claim could be made as to the magazines already delivered.

Hence as to these magazines, defendant compromised no dispute and there was no consideration for the alleged surrender by plaintiff of its right to $284,994 of profits.

A. THE CASE WAS DECIDED BELOW ON THE THEORY OF A COMPROMISE BY WHICH THE GOVERNMENT SURRENDERED SOME RIGHT WITH RESPECT TO THE 298,000 MAGAZINES.

The gist of the findings on this point is in the following language (Finding IV, p. 27):

> "Finally, a verbal agreement was arrived at between Mr. Barker, representing the plaintiff, and Mr. Horton, representing the defendant, by which the plaintiff agreed to abandon and settle all claims, controversies, and disputed points

growing out of contract 48-A if Mr. Horton would secure a revision of the suspension order of January 29, 1919, so as to allow the delivery of 298,000 magazines instead of 142,000."

Clearly, this is a description of a compromise as a result of which each party was to concede something to the other. Under the contract plaintiff was entitled to deliver the remaining 142,000 magazines or to collect its profits. If it gave up that right, it made a compromise.

B. THERE WAS NO DISPUTE BETWEEN THE PARTIES OVER THE DELIVERY OF THE 298,000 MAGAZINES AND THERE WAS NO FOUNDATION FOR ANY DISPUTE.

1. There was no dispute between the parties as to the performance as to 298,000 magazines. The Government made no claim that it could charge any of them back to plaintiff.

Those magazines had already been delivered in strict accord with the contract and had been paid for. No dispute or controversy had arisen as to their delivery. Defendant did not assert that the delivery was improper, and did not claim the right to charge any of them back to plaintiff.

By May 21, 1919, the rights of the parties as to those magazines were settled, and under the contract itself. Their delivery not only was allowed, but was required by the obligation of the contract.

The letter of January 29 did not disallow, or impede or in any way interfere with their delivery, and defendant never so claimed. No revision of that letter was necessary to or could "allow" their delivery.

The entire finding of the Court on the question of an existing controversy is the following:

> "At the time contract 48-A was pending the plaintiff had a large number of contracts with the Government, 18 for furnishing magazines, besides contracts for furnishing machine guns, small arms, and other munitions, and numerous accounts relating to such contracts. The plaintiff was therefore anxious to close this contract on its books, particularly so as there was some discussion going on among the ordnance officials in Washington about what had become of the suspension order of January 29, 1919, and a possibility, when the unauthorized changes became known, of charging back 156,000 magazines (the difference between 142,000 and 298,000) against the plaintiff as having been improvidently accepted and paid for." (25, 26.)

It is clear that no controversy existed between the parties over the delivery of the 298,000 magazines. There had been first a written request to suspend manufacturing operations as to 298,000; and after discussion a verbal request to suspend as to only 142,000 which was complied with.

Both requests were made in order that the parties might negotiate a formal modification and settlement contract.

Plaintiff had performed as to 298,000 magazines and so had the Government. The extent of the finding is that some officers of the defendant were talking among themselves about what had become of the written request to suspend as to 298,000. From it cannot be spelled out the slightest suggestion that any Government officer questioned the validity of the delivery

of these magazines or made the slightest assertion or claim that delivery was invalid or that any part of the magazines so delivered could or should be charged back to plaintiff.

Neither the letter of July 8 nor the one of August 20 tends to show the existence of a dispute as to the validity or propriety of the delivery of the 298,000 magazines theretofore paid for.

The letter of July 8 was part of an offer that if plaintiff were paid $181,213.27 on account of lost production of magazines, no claim would be made on the undelivered balance, which offer was rejected.

This letter states that 142,000 magazines are due the government on contract 48 A; that by reason of a change in design in the magazines the contractor sustained a substantial loss of profit by reason of lost production; that upon receipt of a suspension request as to 142,000 magazines, plaintiff will accept it without making claim for any portion of the magazines so suspended but will present instead its claim for recovery of the lost profit (26).

On July 10, plaintiff filed with the Rochester Board a claim in entire accord with this letter, stating its claim at the sum of $181,213.27 alleged to be on account of lost production of magazines under both contracts. This claim was disallowed by the board (26).

The claim for lost production being disallowed, the proposition contained in the letter of July 8 came to an end. And naturally when the government later requested plaintiff to suspend, plaintiff reserved its right to profits (28).

This letter of July 8 is examined in vain for any reference to the 298,000 magazines already delivered. The existence of an actual dispute or of the slightest

doubt over the validity or propriety of those deliveries cannot possibly be inferred from any language in this letter.

There is no finding that either the letter of July 8 or the claim for $181,213.27 ever left the Rochester Board, and in fact they played no part in the verbal agreement upon which the court's decision is based.

The letter of August 20, 1919, does not tend to show a dispute as to the delivery of the 298,000 magazines. That letter again states that there remains undelivered on the contract 142,000 magazines, that plaintiff has received and accepted no suspension request for this number, that manufacture was discontinued upon verbal request, and asks that suspension request be sent, and states that plaintiff is anxious to receive and accept suspension request, "otherwise the contract will remain open on our books" (27).

The delivered magazines are not mentioned, and there is nothing in the letter to justify an inference that any dispute had arisen with respect to them.

This letter is forward looking, and deals entirely with the 142,000 magazines undelivered. The reason for a written statement by defendant as to them was plain and was frankly stated.

Work on 142,000 magazines had been suspended pending negotiations for a formal written settlement contract. The request for suspension was in a letter which on its face referred to another contract, and in an understanding which changed the figures in that letter. While this suspension at defendant's request temporarily excused performance on both sides, plaintiff was entitled to know whether defendant would perform or not. If defendant wanted the magazines, plaintiff should complete and deliver them. If de-

fendant did not intend to take the magazines, it should so state in writing, and leave plaintiff to its legal remedies.

If the request when received, should be an absolute refusal to perform, plaintiff could, under the decision of this Court in Roehm v. Horst, 178 U. S., 1, accept that as terminating the contract and leaving plaintiff its right to sue for damages.

But when a written suspension request was finally received by plaintiff, it was in the exact language of the one of January 29. This was not an absolute refusal to perform, but notified plaintiff that negotiations would be had looking to the final settlement of their rights. Plaintiff immediately replied, stating that it had suspended, and that it reserved its rights to profits. Later it inquired whether the Government would receive the magazines, and was finally on November 17, for the first time definitely and positively told that the Government would not perform.

This letter, and only this letter, justified plaintiff in treating the contract as at end, and put it in position where suit could be instituted.

Neither letter of July or August played any part in the compromise upon which the Court based its conclusion. That was made in a verbal agreement between Barker and Horton.

2. Delivery of the 298,000 magazines was valid under the contract and there was no foundation for any claim to the contrary.

The contract obligation was to manufacture and deliver these magazines. This was plaintiff's duty. It was equally defendant's duty if those magazines conformed to the specifications, to accept and pay for them. The performance was completed as to 298,000

magazines. This performance was valid and so far as it went disposed of the contract rights of the parties.

The Court below relied upon the suspension request of January 29. That request made no change in or modification of the contract. It was not a repudiation of the contract or its obligations and did not justify plaintiff in asserting that defendant had committed a breach. It was a mere polite request to suspend operations pending negotiations for a settlement. Even had there been a formal statement by a proper officer of the Government that the defendant would no longer receive the magazines, yet continued receipt and payment for them would constitute a retraction of any such attempted repudiation.

(a) The letter of January 29 was not a repudiation of the contract. It was not "a distinct and unequivocal absolute refusal to perform." It could not be and was not treated by plaintiff as a breach.

A fundamental error of the Court below is its construction of this letter. And its entire opinion is built around this error.

The only fact found is the letter which is incorporated in the findings. The construction of that letter is, of course, a question of law. The Court below, while never expressly construing it, in the opinion puts its whole argument on the assumption that the letter was a cancellation of the contract.

The letter is not capable of such construction, was not so intended by the writer, and was not treated by the plaintiff as a breach.

That the letter is not capable of being construed as a repudiation is clear from a mere reading.

The letter is a courteous request to suspend operations and to incur no further expenses in performance

of the contract, expressly made with a view to the negotiation of a supplemental contract for the modification, settlement and adjustment of the existing contract. It concludes with a statement that upon notice of plaintiff's compliance, a representative of the Government will forthwith take up the proposed negotiation looking to the modification of the contract (23).

It recognizes the binding force of the contract, defendant's obligations thereunder, and shows no intent to avoid those obligations. It is not an unequivocal absolute refusal to perform the contract. Clearly it is not itself a modification of the existing contract. It is not a repudiation of defendant's obligations and would not have justified plaintiff in declaring the contract at an end for breach by defendant.

In Dingley v. Oler, 117 U. S. 490, 503, this Court quoted with approval from Smoot's Case, 15 Wall. 36, the following statement of the rule in Benjamin on Sales, 2nd Ed. Sec. 568:

> "A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise and must be treated and acted upon as such by the party to whom the promise was made."

Language going no further than that here used has never been held to amount to a repudiation.

In Dingley v. Oler, 117 U. S. 490, both parties were ice dealers. In 1879 Dingley, who had more ice than he could use, tried to sell some of it to Oler at 50c a ton. Finally Oler took several cargoes under an agreement that he would replace them next season. In July

following when ice was worth $5 a ton, Dingley demanded the return of his cargoes. Oler refused immediate delivery, but offered to pay 50c a ton for the ice, or to give the ice to Dingley when the market reached that point. Dingley treated this as a breach and brought suit. He recovered the lowest value of ice in the season of 1880. This Court reversed the case, holding the action of Oler not to be a definite repudiation.

This Court cites several English cases. In Avery v. Bowden, 5 El. & Bl. 714; 6 El. & Bl. 953, the plaintiff sued for breach of a charter party to provide a cargo at Odessa. The ship was at Odessa early in March, 1854; war was declared between England and Russia March 28, 1854, and known in Odessa April 1, 1854. It was contended that the declaration of war terminated the contract. But before March 28 defendant's agent frequently declared that he had no cargo for the ship, but the master remained at Odessa and continued to demand a cargo. Held not a sufficient repudiation to constitute a breach.

In Barrick v. Buba, 2 C. B. (N. S.) 563, with reference to similar facts, it was held that the mere intimation by the agent of the charterer at Odessa to the master before the time for loading had expired that he had ceded the charter party with all its rights and obligations to a third person and that the master must address himself to that person for a cargo did not amount to a renunciation.

In Johnstone v. Milling, 16 Q. B. Div. 460, cited with approval in Dingley v. Oler, the plaintiff leased certain premises to defendant for 21 years and covenanted to rebuild the premises after the expiration

of the first four years upon receipt of a certain notice. Before the expiration of that time plaintiff gave six months' notice terminating the lease. He continued to remain in possession. When sued he counter claimed damages for failure to rebuild. He proved that for the last two years of his tenancy he constantly talked with plaintiff about getting money to rebuild and the plaintiff always told him that he was unable to do so, and for this reason defendant had given the six months' notice of termination of the lease. Unanimously held not a repudiation. Of this case, this Court said in Dingley v. Oler, p. 503:

> "The most recent English case on the subject is that of Johnstone v. Milling, in the Court of Appeal, 16 Q. B. D. 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that does not by itself amount to a breach of the contract unless so acted upon and adopted by the other party."

In Hoggson v. First National Bank, 231 Fed. 869, plaintiffs, architects, contracted to construct for the defendant a new bank and store at a certain price. The architects reached the conclusion that the price would not permit a satisfactory building and wrote the bank urging that more money be spent, and saying they would prefer not to do the work if the bank insisted on keeping the price within the limit. The bank wrote treating this as a repudiation by the architects who replied that they were anxious and willing to perform the contract at the original price. The Court held this not a repudiation, saying (872):

> "The law seems to be settled that a refusal to fulfill a contract must be absolute to be equivalent to an assent to its dissolution, and to authorize the other party to rescind it; such refusal must be in no way qualified, and should substantially amount to an avowed determination of the party not to abide by the contract."

In Pels Co. v. Saxony Spinning Co., 287 Fed. 282, after many complaints, the seller wrote the buyer expressing surprise at the buyer's request for further shipments and concluded:

> "When you satisfy us beyond any question of a doubt that you will take in the yarns and make satisfactory arrangement with us for the yarn, we will talk to you further about making further shipments."

Held not a repudiation.

In New England Oil Corporation v. Island Oil Marketing Corp., 288 Fed. 961, plaintiff's letter ~~mistaking~~ its rights under the contract, held not an anticipatory breach.

In National Wholesale Grocery Company v. Garcia, 295 Fed. 128, the suit was for breach of contract for the purchase of a carload of prunes. Defendant refused to receive the prunes when shipped to it. It alleged that it had repudiated the contract before time for performance and that it could be held liable for damages only for the difference between the contract price and the market price at the time of repudiation.

The first letter relied on stated that defendant was absolutely unable to take delivery on the contract "and was to request you to cancel same." Plaintiff replied that it must insist upon the performance of

the contract. Defendant replied "we cannot make use of the prunes and we must insist on cancellation." The case went to the jury which proceeded on the theory that defendant did not intend to repudiate the contract but to seek cancellation of it by consent and release from damages. The Court of Appeals held that this was the proper construction of the correspondence.

In Daily v. People's Building Association, 178 Mass. 13, 18, Mr. Justice Holmes held that a statement by the Building Association to Daily that his stock was forfeited because he was six months in arrears, when in fact his arrearage was slightly less than six months, was not a repudiation and did not justify Daily in rescinding and suing for the money paid in.

In Ollinger & Bruce Drydock Co. v. Gibbony, 202 Ala. 516, a request by Gibbony to the Drydock Co. not to further proceed with repairs to a barge until he had been consulted was held not a breach.

The letter of January 29 is a clear recognition of defendant's obligations under the contract. It is not a repudiation of the contract.

The writer of the letter did not intend it as a cancellation.

The instructions given on November 9, 1918, by the War Department to the appropriate officers in Supply Circular No. 111, copy of which is printed herewith, positively instructed the officers not to give notice of cancellation. This regulation will be judicially noticed. U. S. v. Caha, 152 U. S. 211, 222; Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 309.

The reason was that if notice of cancellation were given, the contracting officer of the Government lost

power to enter into a supplemental agreement with the contractor.

This statement of the law is undoubtedly based upon the decision of this Court in Cramp v. U. S., 216 U. S. 494, 500, where it is held that executive officers of the Government are not authorized to settle claims for unliquidated damages.

The War Department expressly states:

> "The contractor shall be requested to suspend work." (Par. 3, 4.)

If thereafter an agreement is reached on just and reasonable compensation by reason of the suspension and termination of the contract, that agreement is to be embodied in a supplemental agreement which requires approval of the Board of Contract Review.

The letter of January 29 is consistent only with a strict compliance with these instructions, and is entirely inconsistent with an attempt at cancellation or repudiation. And the writer's conduct is consistent only with such instruction. Had he intended to cancel or breach the contract, he would, of course, have notified the inspecting, receiving and disbursing officers that they were not to perform the contract as to more than 142,000.

None of the officers of the Government charged with the performance of the contract treated the letter as a cancellation or repudiation. They continued to inspect, receive and pay for the magazines.

The plaintiff did not treat and act upon the letter as an absolute refusal by the defendant to perform. Had it done so it would have notified the Government that the contract was terminated and ended upon the

performance as to 142,000. But it continued to manufacture and deliver magazines beyond that number and to the number of 298,000, and as to the remaining number it merely complied with the request to suspend manufacture and to negotiate a settlement contract.

(b) Even had the letter of January 29 been capable of being construed as a repudiation, the subsequent receipt of and payment for the magazines was a retraction thereof and performance of the contract.

Clearly plaintiff did not treat the letter as a repudiation but continued to deliver magazines to the extent of 298,000. Even had the language been sufficient to constitute a repudiation, plaintiff was not bound to so treat it. The subsequent receipt of and payment for the magazines by defendant constituted a performance of the contract.

As said by Lord Justice Bowen in Johnstone v. Milling, 17 Q. B. Div. 467, 472, and quoted by this Court with approval in Roehm v. Horst, 178 U. S. 1, 13:

> "The promisee when confronted with the declaration of intention by the promisor not to carry out the contract, may treat the declaration as *brutum fulmen* and hold fast to the contract."

In Frost v. Knight, L. R. 7, Ex. 111, Cockburn, C. J., said, also quoted with approval by this Court in Roehm v. Horst, p. 11:

> "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other

> party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Professor Williston thus states the law:

> "If in spite of the buyer's countermand the seller tenders the goods, an acceptance of them, or even a recognition of the contract by taking the goods into his possession, will be an assent to the disregard of the countermand." 2 Williston Contracts, Sec. 1299, p. 2350.

In Trinidad Asphalt Manufacturing Co. v. Buckstaff Bros. Mfg. Co., 86 Neb. 623, the defendant, Buckstaff Bros. Co., ordered certain roofing from plaintiff and later countermanded the order. Notwithstanding, plaintiff shipped the roofing. An official of defendant, after being notified by the railroad company of the arrival of the goods, went to the station, opened a roll and cut off a piece of the roofing, which he took to his store and tested. The Court held that as a matter of law the defendant recognized the contract as still existing by this act, and that the rights of the parties then became the same as if the countermand had never been attempted.

In Hines Lumber Company v. Alley, 73 Fed. 603, 607, after the repudiation there was what Mr. Justice Lurton refers to as an "effort to induce a recantation," which came to nothing.

In Laroe v. Sugar Leaf Dairy Co., 180 N. Y. 367, plaintiff sued for balance due for the sale of milk

over a six months' period, and defendant denied the contract and pleaded payment in full. Plaintiff testified to making the contract with defendant's secretary. Thereafter defendant's president repudiated this contract, and informed plaintiff that the milk if delivered would be paid for at last year's prices. Plaintiff insisted that the contract was valid and the milk must be paid for at the new rate, and that any checks sent would be applied on account. Plaintiff continued to perform, and defendant to receive the milk notwithstanding its repudiation. Defendant sent monthly checks at the old rate together with statements which contained at the bottom "to check in full."

Cullen, Ch. J. (371):

> "The defendant repudiated that contract and it may very well be that after the repudiation of the contract, it was not necessary for the plaintiffs to continue to tender performance. Notwithstanding they were justified in carrying out the contract on their part, and it does not militate against them that they adopted that course."

In Barber Milling Co. v. Leichthammer Baking Co., 273 Pa. 9, 27 A. L. R. 1227, the Baking Company repudiated its contract to buy flour, which plaintiff shipped nevertheless. The court said that the vendee could have recalled his unaccepted cancellation at any time within the term of the contract. The Court quoted from a similar earlier case.

> "The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due."

In Carlisle v. Green (Tex.), 131 S. W. 1140, Green agreed to sell land to Carlisle, who later stated positively that he would not perform. Green replied that he would "hold him to it." On the last day on which performance could be made, Carlisle was ready and willing to perform, but Green tendered performance which varied from the contract. Held that since Carlisle had repented of his refusal by being ready to perform, there was a breach on Green's part.

C. THE EXISTENCE OF AN ACTUAL BONA FIDE DISPUTE BETWEEN THE PARTIES AS TO DEFENDANT'S RIGHTS WITH RESPECT TO THE 298,000 MAGAZINES WAS ESSENTIAL TO A COMPROMISE OF THESE RIGHTS.

1. *There must be an actual dispute before there can be a compromise or accord and satisfaction.*

In Fire Ins. Assn. v. Wickham, 141 U. S. 564, 577, this Court said:

> "The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue.
>
> If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

In City of San Juan v. St. John's Gas Co., 195 U. S. 510, 522, the Court said:

> "The rule in question is subject, among others, to the well established exception that it does not apply where, at the time of the agreement, there was a dispute between the parties, the subject matter of which dispute is embraced in the agreement to extinguish a greater by a less amount. True it is, as pointed out in Fire Ins. Assn. v. Wickham, 141 U. S. 564, it must appear that the alleged dispute really existed and did not arise merely from an arbitrary denial by one party of an obligation which was obviously due."

In Sims v. Three States Lumber Co., 135 Fed. 1019, Mr. Justice Van Devanter, sitting in the Circuit Court of Appeals said:

> "While the evidence is conflicting, it preponderates against the contention, and brings the case within the rule that, where there is a bona fide dispute as to the amount due upon a demand, the acceptance, in satisfaction of the entire demand, of a less sum than is claimed is supported by a sufficient consideration and precludes a recovery of the balance."

In Kiefer Oil & Gas Co. v. McDougal, 229 F. 933, 938, the court quotes Parsons on Contracts (9th Ed.) 477,

> "It is enough if there be an actual controversy, of which the issue may fairly be considered by both parties as doubtful."

In Harrison v. Henderson (Kan.), 62 L. R. A. 760, 762, it is said:

"An accord is an agreement, an adjustment, a settlement of former difficulty, and presupposes a difference, a disagreement as to what is right."

In Silander v. Gronna, 15 N. D. 552, plaintiff Silander had agreed to sell his homestead to Gronna, but the agreement was void because his wife did not sign it. Nevertheless Silander agreed to pay Gronna $75 in consideration of a release from all liability under and cancellation of that agreement. The trial court held there was no consideration for this promise, and Gronna appealed on findings of fact. The Supreme Court of the State held that the findings did not show that there was a compromise of a disputed question actually and in good faith existing between the parties, and therefore there was no consideration.

"There is nothing in the finding from which a conclusion that there was a dispute between the parties can be drawn.

"That there must be a bona fide dispute as to some question before the principles of law pertaining to compromise become applicable is well settled." (Citing cases.)

"A compromise can be made as a matter of law only when the parties disagree among themselves as to their respective rights. A promise to pay a certain sum as a release of a contract is not necessarily a compromise of a disputed right or question. It does not signify that the promise was made after the parties had yielded a part of their claims and mutually agreed that payment of that sum was agreed as a settlement of the dispute * * * The finding does not say that the parties considered that there was any dispute or doubt as to their respective rights under the contract * * *."

Demars v. Musser Sauntry Co., 37 Minn. 418, was an action to recover for work performed in a logging camp. Defense that defendant gave plaintiff a due bill for a certain sum which plaintiff accepted in full settlement of his claim. The trial court held there was no consideration for the alleged settlement:

> "The defendant is entirely right in his law that the compromise of a disputed or doubtful claim is in itself a good consideration, and that no investigation into the character or value of the claims submitted will be gone into for the purpose of setting aside a promise honestly made. It is sufficient that the parties entering into it thought at the time that there was a dispute between them. It is not even necessary that the question in dispute should be really doubtful if the parties bona fide considered it so. The real consideration which each party receives under a compromise is not the sacrifice of the right but the settlement of the dispute.
>
> "But on the other hand it is equally true that to constitute a good consideration for a settlement by way of compromise there must have been an actual bona fide difference or dispute between the parties as to their rights. There is an entire absence of evidence in this case tending to show any such dispute * * *.
>
> "A person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion and not compromise. There must in fact be a dispute or doubt as to the rights of the parties honestly entertained. The evidence of this is utterly wanting in this case."

In Isaacs v. Wishnick, 136 Minn. 317, it is said:

"A compromise is a contract, and like any other contract requires a consideration.

"In order that there may be a valid compromise there must be a bona fide dispute as to the rights of the parties, and to give the agreement a consideration there must be a mutual concession. If there is, then payment of the amount agreed upon will constitute an accord and satisfaction of the original claim. But here the debtor paid only what he admitted to be due."

U. S. Mortgage Co. v. Henderson, 111 Ind. 24, 37:

"In order that a compromise may constitute a sufficient consideration for the enforcement of an executory contract, there must have been an actual bona fide claim, founded upon a colorable right, about which there was room for honest doubt and actual dispute."

12 C. J. 316 states the rule:

"Conflicting claims are essential to the validity of a compromise, one of its essential elements being the existence of a bona fide dispute or controversy between the parties."

2. The dispute must be made in good faith and based at least upon colorable grounds.

This is apparent from the foregoing decisions.

In Gunning v. Royal, 59 Miss. 45, appellant hired a mare and driver from appellee; the mare was killed through the driver's negligence. The owner made a claim against appellant, who gave a note for part of the claim. Held no consideration for the note.

"The existence of a dispute or controversy between the parties is not a sufficient consideration to support a promise to pay money in settlement of it where no valid demand for anything whatever exists in favor of the promisee. There must be a valid demand, to some extent, or for something, to uphold a promise of this kind."

Melcher v. Ins. Co., 97 Maine 512, 517:

"The claim must be one that is made in good faith with a belief by the claimant that there is some chance of its successful enforcement. The surrender of a mere groundless claim which is known by both parties to be unenforcable is not a sufficient consideration."

In Jarvis v. Sutton, 3 Ind. 289, it was held that the transaction between the parties amounted only to a lease of a farm; and that an agreement to deliver crops to the lessee in consideration that he release his rights under an alleged contract of sale was without consideration.

"Neither does the evidence show that there was any compromise which would be a sufficient consideration. It is true a compromise of doubtful claims may be sufficient to found a consideration upon but in such cases there must be a surrender of some legal benefit which the other party might have retained.

"In other words, there must be some consideration for a compromise as well as for any other contract if it is executory and remains to be enforced. A promise to give something for the compromise of a claim about which there is merely a dispute and controversy, and for which there is no legal foundation whatever is not sufficient to sustain a suit at law.

D. THE GOVERNMENT HAVING ASSERTED NO RIGHT AND THERE BEING NO ACTUAL DISPUTE BETWEEN IT AND THE PLAINTIFF AND NO VALID GROUND UPON WHICH ONE COULD BE BASED, THERE WAS NOTHING TO COMPROMISE AND NO CONSIDERATION FOR PLAINTIFF'S ALLEGED SURRENDER OF ITS PROFITS OF $284,994.

This necessarily follows from the foregoing discussion.

The court finds Mr. Horton was to secure the revision of the letter of January 29 "so as to allow the delivery of 298,000 magazines instead of 142,000." This is the only circumstance suggested as a consideration for the alleged surrender of plaintiff's profits.

As to the delivered magazines, to quote from Silander v. Gronna, *supra*, "there is nothing in the findings from which a conclusion that there was a dispute between the parties can be drawn." Not only was there no dispute but there was no ground on which a dispute could be based. The 298,000 magazines had been properly delivered and paid for under the contract. As to that delivery, no question had been raised and there was no foundation on which to raise any question. The letter of January 29, a mere request, could not affect in any degree rights established by the contract; such a right of plaintiff was to deliver and receive payment for magazines up to the total number specified in the contract. It follows that no revision of the letter of January 29 could allow or was needed to allow their delivery. The conclusion of law of the Court below, therefore, is not supported by the facts. There was nothing for the Government to compromise, and therefore there was no consideration for the alleged surrender by plaintiff of its right to its anticipated profits.

II. THE COURT IN ITS OPINION RELIES ON AN "ELEMENTARY" PROPOSITION OF LAW WHICH IS NOT APPLICABLE TO THE FACTS FOUND AND IS NOT SUPPORTED BY THE WEIGHT OF AUTHORITY.

As we have shown, the Court assumes that the parties entered into a compromise in August or September, 1919, by which plaintiff surrendered its right to its profits of $284,994, but under which the United States surrendered nothing.

In its opinion (32, 33) the Court, misled by its fundamental error misconstruing the letter of January 29, argues that the letter of January 29 was a cancellation as to 298,000 magazines; and states that it is elementary law that where there is such a cancellation or repudiation the parties may without new consideration negotiate a modification agreement by which one agrees to take less than the original number and the other agrees to surrender his rights as to the part not performed.

It is clear that the Court uses the word "cancelled" as meaning breached with the right to the injured party to sue for damages, and not as meaning a rescission bringing the contract to an end without further right or remedy in either party.

This opinion is not part of the case to be considered by this Court. The only question is whether the judgment is supported by the facts actually found by the Court of Claims. Crocker v. U. S. 240 U. S. 74, 78.

The so-called elementary proposition of law relied on by the Court is not applicable to the facts found by it. There was in fact neither a cancellation of any

part of the original contract, nor was there a modification thereof.

It is then immaterial whether their proposition is correct or not. But that proposition is opposed to the great weight of authority. Upon the facts of this case actually found by the Court, even had there been in fact a modified agreement, it was not supported by any consideration either that suggested by the Court nor any other.

A. THERE WAS NO CANCELLATION OR BREACH OF THE CONTRACT UNTIL THE GOVERNMENT'S LETTER OF NOVEMBER 17, 1919.

The Court's conclusion of law is predicated on its initial and fundamental error construing the letter of January 29.

That letter, as we have shown, was not a cancellation or repudiation of the contract. It was a mere request to suspend partial performance pending negotiations for settlement. The understanding that this request should operate to the extent of 142,000 instead of 298,000 magazines (p. 24) means only that the one figure was substituted for the other. No other change was made, and the letter was still but a polite request to suspend work. The only effect of a compliance with the request was temporarily to excuse performance as to the 142,000 magazines pending negotiations.

That the writer of the letter of January 29 did not intend it as a cancellation is clear. This Court in Cramp v. U. S., 216 U. S. 494, approving the long-continued practice of the departments, held that executive officers were without authority to negotiate the

settlement of a contract after it was breached. All Government contracting officers were notified of this state of the law by the instructions of November 9 before mentioned (Ex. A, this brief).

These instructions expressly forbade the contracting officer to give notice of cancellation and instructed him to request the contractor to suspend work in whole or in part, pending negotiations; and that when these negotiations had resulted in an understanding they should be embodied in supplemental contract which should set forth "that it constitutes full and final settlement of all questions and claims growing out of the original contract or order" (par. 6). This is in accord with Art. 560 of the Army Regulations (Ed. 19 B, p. 122), which requires contracts with corporations to be signed by a properly authorized officer thereof.

One attempting to sustain the argument of the Court is in a dilemma.

There either was or there was not a cancellation of the contract.

If there was a cancellation, none of the executive officers, from highest to the lowest, had power to negotiate a settlement contract, and they were so informed, and there could have been no valid modification agreement.

If there was no cancellation, then under none of the authorities hereafter cited, would the continued performance by the Government, or its promise to perform its obligations under the original contract be consideration for a surrender by the plaintiff of any of its rights thereunder.

The revised letter of September 12 made no change in the letter of January 29, except to substitute the

figures 142,000 for 298,000. Otherwise, it was the same polite request to suspend manufacturing operations and to negotiate a settlement. Like the original request, it was not a cancellation or repudiation of any part of the contract. Not only was it not a modification, but it expressly pointed out that the modification agreement, if any were made, was to be made in the future after negotiations.

Upon receipt of this letter plaintiff replied that it had suspended as requested and reserved all rights and especially its rights to recover profits (28).

Plaintiff wrote several other letters making inquiry as to the intention of the Government regarding the delivery of the remaining 142,000 magazines or the payment of prospective profits. On November 17, 1919, the Chief of Ordnance replied that the Government would not accept delivery of the magazines (28). The correspondence clearly shows that the officers of the Government prior to this time did not think that they had canceled or breached the contract. That letter was the first repudiation or breach.

B. Contract 48A Was Never Modified by Agreement of the Parties That 298,000 Magazines Should be Accepted in Full Performance.

Nowhere in the findings of fact is it stated that the parties or any of their employees agreed that the contract should be reduced from one for 440,000 to one for 298,000.

The only language in any way dealing with the subject occurs on page 24. There, after finding that the letter of January 29 was issued from Washington, the Court continued:

"This notice was forwarded to the Rochester District Claims Board for delivery to plaintiff, and its purport having been communicated to plaintiff, an agent of the latter entered into verbal negotiations with an official of the claims board relative to the same. An understanding was arrived at between this agent and official to the effect that the order of suspension should operate to the extent of 142,000 magazines instead of the 298,000 stated in the notice. Thereupon plaintiff wrote under date of February 13, 1919, to the secretary of the said District Claims Board."

The substance of this is that after the receipt of the letter there were verbal negotiations at Rochester which resulted in an understanding that the letter should operate to the extent of only 142,000 magazines. This means only that the parties understood that the figures "142,000" had been substituted in the letter for "298,000." There is no finding that plaintiff promised or agreed to do anything. All plaintiff did was to write a letter of February 13 and state that it understood the letter of January 29 was not correct and that plaintiff awaited a change in the wording of the notice.

These findings are not susceptible of the construction that the parties agreed at that time to reduce the quantity to be delivered under the contract to 298,000 magazines.

C. Performance or a Promise to Perform One's Contract Obligations Does Not Constitute Consideration for a New Promise by the Other Party to That Contract.

The Court below contends that if a party to a contract informs the other side that he will no longer per-

form his obligations under the contract (which is clearly the sense in which they use the word "canceled"), a promise by that person to do only what he is obligated by the existing contract to do, is consideration.

The law on this subject is accurately and suscinctly stated by Professor Williston in his recent work on Contracts:

> "Performance or promise to perform any obligation previously existing under a contract with the promisee is not valid consideration.
>
> "Where A and B have entered into a bilateral agreement, it not infrequently happens that one of the parties, becoming dissatisfied with the contract, refuses to perform or to continue performance unless a larger compensation than that provided in the original agreement is promised him. Especially common is the situation where a builder or contractor undertakes work in return for a promised price and afterwards finding the contract unprofitable, refuses to fulfil his agreement but is induced to fulfil it by the promise of added compensation. On principle the second agreement is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion. In a few jurisdictions a contrary view has prevailed." 1 Williston Contracts, Sec. 130.

The numerous cases cited by him fully support his summary of the law. Among the leading cases are:

Stilk v. Myrick, 2 Camp. 317.
Alaska Packers Assoc. v. Domenico, 117 Fed. 99.
Frankfurt-Barnett Co. v. Prym Co., 237 Fed. 21.
Davis v. Morgan, 117 Ga. 504, 61 L. R. A. 148 (Opinion by Mr. Justice Lamar, later of this Court).
Vanderbilt v. Schreyer, 91 N. Y. 392.

The contrary view is quite fully discussed by Professor Williston in section 130a. There he shows the unsoundness of the reasoning of the courts of the few states in which the majority rule is not followed.

D. There Was no Other Consideration to Plaintiff to Support a Modification of the Contract to Accept 298,000 Instead of 440,000 Magazines.

We have shown that there was no breach or cancellation until November 17. The Court's discussion of this proposition proceeds on assumptions totally different from the facts which it has found.

The contract was not cancelled in January or February of 1919. The plaintiff did not, therefore, negotiate for the delivery and acceptance of a less quantity than 440,000 magazines, but merely complied with the request to temporarily suspend work on 142,000 magazines. This was no modification of the contract. The contract could not be modified by the defendant's order alone.

The partial performance by both sides did not change their position. That performance was proper and was made under the contract.

The very language used by the Court implies that the contractor as well as the Government must be released from some obligation. There must be mutual concessions, each constituting consideration for the agreement of the other.

In order to support such an agreement, the plaintiff must be released permanently by a valid agreement from further obligation to perform the remainder of the contract.

The Court's findings are examined in vain for any release by agreement from the plaintiff's obligations to deliver the remaining 142,000 magazines.

The instructions of the Secretary of War before mentioned explicitly provide that any such release should be embodied in a formal supplemental contract. True, the breach on November 19 did excuse plaintiff of further obligation to perform. But relief by breach of a contract is not a modification by agreement. It is simply the wrongful act by one party.

The letter of January 29 contained no release as to the 142,000 magazines. The Rochester officials had no authority to release plaintiff and there is no finding that they attempted to do so.

The Court seems to consider that the modification is to be found in the letter of September 12. But that letter contained no release to plaintiff of its obligation to furnish the remaining 142,000 magazines. Like its predecessor it merely temporarily excused performance pending negotiation of the settlement contract. Until the settlement contract was actually made, the Government was at liberty to withdraw its request to suspend and to demand full performance as to the remaining 142,000 magazines.

This right remained until the repudiation by the Government, which occurred in the letter of November 17.

There being no release by agreement of the Government's rights to demand complete performance as to the 142,000 magazines, there was no consideration to the plaintiff to release the Government from its obligation to purchase those magazines.

It follows, therefore, that the principle stated in the opinion is not applicable to the facts found. There was not found in the facts a valid agreement to modify the contract by accepting performance as to 298,000 magazines and each of the parties releasing its rights as to remainder.

CONCLUSION.

We have shown that there was no dispute between the parties as to the validity or propriety of the performance of the contract as to the 298,000 magazines delivered and paid for and that there was no foundation upon which any such dispute could be based.

The verbal agreement found in the facts and upon which the Court below based its conclusion of law, therefore, is invalid because there was no consideration to support it.

This harmonizes perfectly with the subsequent conduct of both plaintiff and defendant which undoubtedly shows that neither one had the slightest inkling that any compromise valid or otherwise had been reached between them.

Plaintiff in acknowledging the request to suspend of September 12 stated that it had suspended as to the 142,000 magazines but reserved its right to profits.

Thereafter it several times wrote and pointedly inquired whether defendant intended to receive the 142,000 magazines or to pay its profits thereon.

Had there been a compromise and settlement, the ordnance officer would have replied that there was no longer any obligation on the Government's part to take the 142,000 magazines and that plaintiff had compromised its right to profits thereon. But they did not mention this compromise. Instead the officer replied that the Government would not take the magazines and that "he was not authorized to pay anticipated profits." This was not a denial of liability on the contract, but merely a statement of the holding in Cramp v. U. S., *supra*.

It cannot be lightly assumed that the Ordnance officers who had made an important agreement relieving the Government of a substantial claim for damages were unfamiliar with everything that had been done in connection with it. The only other conclusion to be drawn from their actions and letters is that there was no such agreement in effect.

And it cannot be lightly assumed that had the ordnance officers made a compromise and settlement with plaintiff, they would have failed to obey their instructions to embody it in a formal written supplemental contract which would forever put at rest the rights of the parties under the contract in suit.

The inescapable conclusion is that this agreement never appeared to anybody until the case reached the Court of Claims.

It is respectfully submitted that the judgment appealed from should be reversed with directions to enter judgment on the findings of fact for plaintiff for its profits of $284,994.

JESSE C. ADKINS,
JOHN H. ISELIN,
FRANK F. NESBIT,
Attorneys for Appellant.

September, 1924.

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APPENDIX A.

WAR DEPARTMENT,

PURCHASE, STORAGE AND TRAFFIC DIVISION,

GENERAL STAFF.

SUPPLY CIRCULAR
No. 111.

Washington, November 9, 1918.

Subject: TERMINATION OF CONTRACTS AND ORDERS IN PUBLIC INTEREST.

1. Whenever the appropriate officers of the Government determine that it is necessary, in the public interest, to terminate, in whole or in part, a contract or a purchase or procurement order for materials or supplies, such termination shall be effected as herein directed.

2. Whenever such contract or order expressly provides that it may be terminated in the public interest, termination may be effected only in accordance with such provisions, unless it shall be in the public interest to terminate it in accordance with the provisions of this circular and the parties shall agree thereto.

3. Whenever such contract or order does not expressly provide that it may be terminated in the public interest, the contractor, if the public interest so requires, shall be requested to suspend work thereunder, in whole or in part and to supply promptly a report under oath showing in detail the following information in so far as applicable:

(1) Raw materials on hand: Cost plus inward handling charges plus such portion of overhead as is directly applicable.

(2) Partly finished products on hand: Cost of raw material and labor, plus such portion of overhead as is directly applicable.

(3) Finished products on hand: Contract price, less freight charges if the contract or order specifies delivery at point other than factory.

(4) Special facilities: Cost of facilities specially provided and paid for by the contractor for the performance of the contract, the necessity of which was contemplated at the time the bargain was made and the cost of which was included in the contractor's original estimate. From the cost of such facilities deduct their fair value at the time the contract or order is terminated and state such portion of the remainder as is represented by the ratio of the uncompleted portion to the whole contract or order.

(5) Commitments: The contractor's commitments to suppliers, subcontractors, and others for contributing materials or work, to be determined, in so far as applicable, in the same manner as indicated in (1), (2), (3), and (4).

If the contractor claims additional compensation by reason of any other item or items, he may add such item or items, together with a detailed statement of the facts on which his claim is based.

(4) Unless otherwise directed by the chief of the bureau, the contractor shall be requested to suspend work and shall not be given notice of cancellation. If a notice of cancellation is given, the contracting officer

of the Government loses his power to enter into a supplemental agreement with the contractor.

5. No allowance will be made for prospective profits, provided, however, that with the consent of the chief of the bureau an allowance of not more than 10 per cent of the cost of partly finished products on hand may be allowed.

6. If agreement is reached on a just and reasonable compensation to be paid to the contractor by reason of the suspension and termination of the contract or order, such agreement shall be embodied in a supplemental contract which shall set forth the agreed compensation and shall provide in specific terms that it constitutes full and final settlement of all questions and claims growing out of the original contract or order. Such supplemental contract shall also provide that all raw materials, partly finished products, and finished products on hand shall become the property of the United States, unless and to the extent that the parties agree that such materials and products shall remain the property of the contractor in which event the Government shall be credited with the agreed value of the same.

7. Each such supplemental contract shall provide that it shall not become a valid and binding obligation of the United States until it has first been approved by the Board of Contract Review of the supply bureau affected.

8. The chief of the bureau may direct that no such supplemental contract, or no such supplemental contract providing for payment in excess of a specified sum, shall be executed by the contracting officer unless first approved by the chief of the bureau.

9. Attention is directed to General Order No. 103, November 6, 1918, creating the Board of Contract Adjustment and empowering such board to hear and determine all claims, doubts, and disputes, including all questions of performance and nonperformance, which may arise under any contractor and the contracting officer have been unable to agree.

10. This circular applies solely to the termination of contracts or orders, in whole or in part, in the public interest and does not affect the right of the Government to cancel a contract or order by reason of the contractor's default, which subject is left to be determined by the provisions, if any, of the contract or order and the principles of law applicable thereto.

By Authority of the Secretary of War:

GEO. W. GOETHALS,
Major General, Assistant Chief of Staff,
Director of Purchase, Storage and Traffic.

CONTENTS

CASES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1924

SAVAGE ARMS CORPORATION, APPELLANT
v.
THE UNITED STATES
No. 13

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

I

STATEMENT

Savage Arms Corporation was engaged exclusively during the World War in the manufacture of Lewis machine guns and spare parts, including magazines. (Tr. 22.) It had 18 contracts with the Government for the manufacture and delivery of Lewis machine guns alone for the Army and Navy under which it actually delivered, up to and including June 20, 1919, 2,201,568 such magazines with aggregate profits of $4,417,546.98, on which it was obliged to pay taxes. (Tr. 22.) It had other large contracts for manufacture and delivery of machine guns, small

arms, and munitions. Under a contract to increase the producing facilities of Savage Arms Corporation, the Government expended $2,850,000 for the erection of buildings and machinery and retained title thereto. (Tr. 22.) The accounts with respect to all of these various contracts and activities were pending during the performance of the contract on which the suit was brought. (Tr. 22.)

Among them was a contract executed on April 30, 1918, by which Savage Arms Corporation agreed to manufacture and deliver to the United States and the latter agreed to pay for certain spare parts for 22,000 Lewis machine guns. There was a separate contract, dated June 6, 1918, covering the 22,000 Lewis aircraft machine guns. Originally the two contracts were embraced in one but they were later separated. (Tr. 22.) The single item now involved relates to 440,000 magazines for the Lewis machine guns, aviation type, for which $4.24 each was agreed to be paid. (Tr. 23.)

While engaged in the performance of its contract of April 30, 1918, a supplemental contract, dated *January* 18, 1918, was executed by which the requirement for the manufacture and delivery of 22,000 shell deflectors provided in the contract of April 30, 1918, was canceled because it was a duplication of the same requirement in the contract of June 6, 1918; the Government was released from all claims arising out of that cancellation and, except as thus modified, the terms and conditions of the

contract of April 30, 1918, were allowed to remain in full force and effect. (Tr. 23.)

Beginning on September 28, to and including December, 1918, 24,347 of the 440,000 magazines were delivered. (Tr. 23.)

On January 29, 1919, notice was issued (Tr. 23) from office of Chief of Ordnance, Washington, signed by the contracting officer thereof, addressed to appellant at Utica in which, by direction of the Chief of Ordnance, the appellant was (*a*) "*requested in the public interest* immediately to suspend operations under your contract, or order, * * * to the extent of 298,000 magazines, together with their spare parts;" (*b*) "* * * also requested except for the purpose of completing deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further subcontracts, make no further commitments, and incur no further expenses in connection with the performance of said contract or order."

The notice further stated (Tr. 24), "This request is made with a view to the negotiation of a supplemental contract providing for the modification, settlement, and adjustment of your existing contract, or order, in a manner which will permit of a prompt settlement."

This notice requested immediate acknowledgment with indication of decision as to compliance or rejection and stated that upon notice of compliance a representative of the Ordnance Department will

forthwith take up with appellant the proposed negotiation. (Tr. 24.)

Rochester District Claims Board, to whom the notice was forwarded, communicated the purport thereof to Savage Arms Corporation. (Tr. 24.) An agent of the latter entered into verbal negotiations with an official of the Claims Board (whose name does not appear) relative to same. (Tr. 24.) The Claims Board had no authority to change the suspension order (Tr. 24), but the agent and the official arrived at an understanding "to the effect that the order of suspension should operate to the extent of 142,000 magazines instead of the 298,000 stated in the notice" (Tr. 24).

These negotiations with the official at the Claims Board had reached such a stage and were so successful as that in less than two weeks appellant was able to report; for on February 13, 1919, appellant wrote to the Secretary of the Claims Board, "We have your letter of January 31st, including suspension notice dated January 29th from Washington, * * *. Our Mr. Phillips, from Utica, has discussed this matter with you, and it is understood that the suspension notice as received is not correct. We therefore await a change in the wording of this notice to correspond with *the later instructions received at our Utica plant.*" (Tr. 24.) Before its letter of February 13, 1919, was written, appellant had stopped work on the 142,000 magazines, having received the verbal instructions above mentioned to discontinue the manufacture of that number, although the written

instructions stated 298,000. (Tr. 25.) Following its letter of February 13, 1919, appellant made and delivered 273,653 magazines, which, added to the 24,347 delivered prior to the suspension notice, totaled 298,000, for which the final payment was made on May 21, 1919. (Tr. 25.)

While it appears from the evidence that the Rochester District Claims Board had no authority to change the suspension order of January 29, 1919, it does not appear what member of that Board informed appellant that the notice covering 298,000 was incorrect and allowed it to manufacture that number instead of 142,000. (Tr. 24.) As late as August 1, 1919, the Chief of the Contract Section of the Ordnance Department never knew of that change. (Tr. 25.) On July 18, 1919, the Rochester District Claims Board requested the Chief of the Contract Section to issue an order of suspension against the contract of April 30, 1918, but did not mention the change that had been made in the notice, and the Chief of Ordnance, as late as August 1, 1919, notified the Rochester District Claims Board that he was willing to relieve from the manufacture and delivery of 298,000.[1] (Tr. 25.)

Before its letter of February 13, 1919, was written, the plaintiff had stopped work on the 142,000, having received the verbal instructions to discontinue on that number, although the written instructions stated 298,000 (Tr. 25), and made no request to be

[1] That number had been delivered and paid for by May 21, 1919, apparently unknown to the Chief of Ordnance until September 12, 1919.

allowed to furnish them (Tr. 25). Thereafter some of the orders for materials were canceled, some of the machinery for manufacturing the magazines was removed, and the space otherwise occupied. (Tr. 25.)

Numerous accounts growing out of the 18 contracts were pending (Tr. 25) and discussion was going on among the Ordnance officials in Washington as to what had become of the suspension order of January 29, 1919, and a possibility, after learning of the change, of charging back 156,000 magazines against the appellant as having been improvidently accepted and paid for (Tr. 25, 26.) The appellant was therefore anxious to close this contract on its books. (Tr. 25.)

Accordingly, on July 8, 1919, appellant wrote to the Rochester District Claims Board and, after referring to their long-distance telephone conversation of that day, said (Tr. 26) (italics ours):

> * * * if you have not already done so, we will thank you to make immediate arrangements to make application to Col. R. H. Hawkins, Chief of the Contract Section, Administration Bureau, Washington, for suspension request to be sent to us through your office, terminating the * * * contract, on which there are now due to the Government the quantity of 142,000 extra magazines for machine guns.
>
> *Upon receipt of this suspension request we hereby agree to immediately accept it without making claim for any portion of the 142,000 magazines so suspended.*

The letter further stated that by reason of the change in design appellant had "sustained a substantial loss of profit by reason of lost production, and inasmuch as this contract will have been suspended upon acceptance of the above-mentioned suspension request, we will then accordingly file our claim for recovery of this lost profit." [2]

Following up this letter of July 8, 1919, appellant persistently and repeatedly urged the officials of the Ordnance Department to revise the suspension order of January 28, 1919, so as to authorize delivery of 298,000 magazines. (Tr. 27.) Thus, on August 20, 1919, appellant again wrote to a Mr. Horton, referred to previous conversation between them, and urged that suspension request be issued "for our acceptance in termination of this contract" (Tr. 27), and added, "Some time ago we received verbal instruction of the Rochester office to discontinue the manufacture of these magazines, as they were not wanted. *So that there will be no misunderstanding,* we are anxious to receive and accept suspension request, *otherwise the contract will remain open on our books.* (Tr. 27.) And finally a verbal agreement was arrived at between representatives of the appellant and the Government (Tr. 27) by which the plaintiff agreed to "*abandon and settle all claims, controversies, and disputed points growing out of contract 48–A*[3] if Mr. Horton[4] would secure a revision of the suspension order

[2] Such a claim in the sum of $181,213.27 was presented to and disallowed by the Rochester District Claims Board, the grounds of disallowance not being shown. (Tr. 26.) Another claim of $26,711.03 was paid on November 12, 1919. (Tr. 26.)

[3] The contract of April 30, 1918.

[4] The representative of the Government.

of January 29, 1919, so as to allow the delivery of 298,000 magazines instead of 142,000." (Tr. 27.) Mr. Horton performed his agreement, and as a result of his efforts the suspension order of September 12, 1919, was issued, addressed to plaintiff by direction of the Chief of Ordnance, and signed by Lieutenant Colonel Hawkins, of the Ordnance office. (Tr. 27.) In substance that suspension order is the same as the suspension order of January 29, 1919, with this exception: The words "except such operations as may be necessary to complete delivery thereunder of a total (including all deliveries heretofore made) of 298,000 magazines, together with their spare parts" (Tr. 27), were substituted for the words "to the extent of 298,000 magazines, together with their spare parts" (Tr. 16).

Having, unknown to the Ordnance Department, secured the change from 298,000 to 142,000 by the unauthorized action of the Rochester District Claims Board, having been paid in full for all agreed deliveries under the contract, having agreed "to abandon and settle all claims, controversies, and disputed points growing out of" the contract, having received a total profit of $598,085 on the order, having actively solicited and procured the suspension request in termination of the contract for unmanufactured 142,000 magazines, having eagerly solicited the request because appellant was anxious "to close this contract on its books" in order "that there will be no misunderstanding," this appellant then naively acknowledged the eagerly solicited suspension request

of September 12, 1919, in these words: "Acknowledgment is hereby made of 'suspension request' * * * substituted for *incorrect suspension request* * * *" (Tr. 28) and "This corporation has suspended work in accordance with said request, reserving, however, all its rights against the United States * * * for failure of the Government fully to perform all the provisions of the contract * * * *and especially its rights to recover all the profits which it would have made had it been permitted to complete said contract*" (Tr. 28). In answer to letters which demanded "prospective profits," the Chief of Ordnance replied that the Government could not use and would not accept the 142,000, and he was not authorized to pay "anticipated profits." (Tr. 28.)

This suit was then commenced. On a full finding of facts from which the foregoing statement is made the Court of Claims dismissed the petition. (*Savage Arms Corporation* v. *United States*, 57 Ct. Clms. 71.)

II

ARGUMENT

A. THE OPPOSING ARGUMENT THAT NO DISPUTE EVER EXISTED BETWEEN THE PARTIES UPON WHICH TO EFFECT A COMPROMISE AND THEIR AGREEMENT TO SETTLE ANY ALLEGED DISPUTE WAS WITHOUT CONSIDERATION MAY NOT PREVAIL

In rejecting *in toto* the claim of the appellant with costs, the Court of Claims in its opinion used vigorous language appropriate to the circumstances (57 Ct. Clms. 71, 81, 82, 86, 87):

> Thus we find the plaintiff acting upon a verbal modification of a written order of sus-

pension extending expressly to 298,000 magazines, manufacturing, delivering, and receiving payment for the identical number it had been notified to suspend, and making but one feeble effort to have the verbal modification put in writing, until a date subsequent to the time when said magazines had been delivered and paid for. The plaintiff's attitude then, at this stage of the proceedings, as shown by the record, was simply this: We received a written order to suspend the manufacture of 298,000 magazines. We communicated with the defendant and it was verbally agreed that we might furnish 298,000 magazines and suspend 142,000. We furnished the 298,000; the defendant paid for them. We then in January did suspend the 142,000. We made no effort to manufacture or deliver the same, but on the contrary specifically asked for and agreed to accept a suspension order for the 142,000.

Why do we say this? Because the inference is irresistible. After the plaintiff had completed the manufacture and delivery of the 298,000 magazines and been paid therefor, its officers realized that this transaction had been closed upon the bare, uncertain authority of a verbal order, and therefore it was persistent and energetic in its efforts to have this past transaction officially and expressly closed by the proper authority, so that in no event could the large sums of money it had received thereunder be checked against other sums due the plaintiff under other contracts, aggregating millions of dollars.

This view of the situation is expressly confirmed and substantially put at rest by the letter of July 8, 1919, written by the plaintiff to the Rochester District Claims Board, wherein the plaintiff in positive terms expressly agrees to waive all claims for any portion of alleged damages due to the suspension of 142,000 magazines, if the officer addressed will "make immediate arrangements * * * for suspension request to be sent to us through your office terminating the above-mentioned C. M. G. 48–A contract." This letter of July 8, 1919, was the result of a verbal agreement between the plaintiff and the officers of the Rochester District Claims Board, subsequently ratified and confirmed by the Chief of Ordnance of the War Department at Washington. The history of this transaction alone is sufficient to determine the case adversely to plaintiff's contention.

* * * * *

On September 24, 1919, for the first time, we find a written reservation of the plaintiff's alleged claim for prospective profits on the 142,000 magazines undelivered. It at once arouses an extremely pertinent inquiry. Why this belated assertion of a claim which in all the correspondence between the parties—set forth in the findings—is not once reserved or treated in any other fashion than an unconditional surrender? We would dislike to indulge the inference that during this long period of time this particular claim was employed as a potent instrumentality to extract from the defendant a settlement advantageous to the

plaintiff's securing a final and complete adjustment of its business transactions with the defendant under its contract, and after having served its purpose in this respect appear again as an assertion of a separate and distinct liability. The officers of the defendant, beyond the peradventure of a doubt, believed and treated it as settled in the agreement made. The correspondence of the plaintiff, in every letter and in every request, expressly mentioned its existence and agreed expressly to accept the suspension notice for 142,000 magazines without qualification or reservation. As late as August 20, 1919, the plaintiff wrote the defendant to this effect, as set forth in Finding IV.

The whole argument of counsel for appellant is reduced to this proposition: The Government made the contract and its terms have not been rescinded in any way by the acts of the parties; all of the activities of the Savage Arms Corporation and its representatives with the Rochester District Claims Board and the Ordnance Department were to keep this contract alive until it was fully discharged; that nobody ever intended anything to the contrary; that when the Ordnance Department wrote the suspension notice of January 29, 1919, covering 298,000 magazines, which was promptly communicated to the Savage Arms Corporation, the Ordnance Department did not mean what it said; even though quickly the Savage Arms Corporation secured the change to 142,000 magazines through

the unauthorized action of Rochester District Claims Board, that, too, meant nothing except as it enabled the Savage Arms Corporation to deliver to the Government and receive payment for a vast quantity of unnecessary and useless material.

Having gotten that far, and then fearing that 156,000 magazines (the difference between 142,000 and 298,000) would be charged back against it as having been improvidently accepted and paid for, Savage Arms Corporation got active to secure the suspension order for 142,000 magazines and in writing assured the Government of its willingness "to immediately accept it without making claim for any portion of the 142,000 magazines so suspended." (Tr. 26.) This, we are told, was not compromise, or if it was compromise, the words are absolutely meaningless, as there was no consideration to support any compromise. The same is said with respect to the agreement of the appellant "to abandon and settle all claims, controversies, and disputed points growing out of the contract" if Mr. Horton would secure a revision of the suspension order, which Mr. Horton did. In all of these transactions with the officers of the Government who were liquidating the World War, it now appears that instead of undertaking an adjustment of its differences with the officers of the Government, and to close the contract on its books, and "to prevent misunderstanding," appellant was (1) securing a change through the unauthorized action of the Rochester District Claims Board of the suspension notice which had been sent

to it from the Ordnance Department in order that it might come into possession of a total profit of $598,086; and (2) it was laying the foundation for the suit in the Court of Claims for the further profit of $284,994 on the remaining 142,000 magazines.

Savage Arms Corporation solicited the suspension request of September 12, 1919, with the written representation that it would make no claim for the 142,000 (Tr. 26) and on an agreement "to abandon and settle all claims, controversies, and disputed points." It thus secured that suspension request (Tr. 27). Savage Arms Corporation then gave notice that it reserved all rights to recover anticipated profits. (Tr. 28.) Such is its position before the Court.

In *United States* v. *Behan*, 110 U. S. 338, 345, this Court announced the principal which is controlling here, thus:

> When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he can not recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*.

The Court of Claims said on the same subject (57 Ct. Clms. 86):

> It is elementary, and we need not cite authorities to sustain the proposition, that where a contractor under obligation to furnish a stated quantity of article finds his contract canceled and subsequently negotiates for the

> delivery and acceptance of a less quantity than originally intended, accepts payment therefor and a modification order in accord with the agreement, he can not then assert a claim for the undelivered balance. The position of the parties has been materially changed. The contractor must stand upon his legal rights under the original cancellation order; he can not abandon them and enter upon the performance of the agreement in accord with the accepted changes and at the same time assert the binding force of the original contract. Two avenues of redress were open to the contractor in the first instance, and the right of election was his. He might choose the course which in the end entailed the least loss, and induce the other party to accept a part performance in lieu of a total or partial breach, or he might treat the contract as at an end and sue for damages. He can not accept one remedy without losing the other.

In *Duesenberg Motors Corporation* v. *United States*, 260 U. S. 115, the contractor sued for anticipated profits which it failed to realize out of certain contracts for aeronautical equipment for war purposes because of alleged delays resulting from changes made in the specifications. The Court of Claims dismissed the petition. In affirming its judgment, this Court said (260 U. S. 122, 124, 125):

> The agreements are of significant strength. Their legal effect and that of the contract can not be determined by any one provision but

the totality of them must be regarded and their relations and purposes.

A war of magnitude was waging. The Government was eager for efficient instrumentalities and the contractor was enticed by the profit of their manufacture. The matters were urgent, but they were beset with contingencies. The Government could terminate the contract in the interest of the public welfare; and the war might cease. The latter did happen. However, before it happened, and before, it may be, there were signs of its happening, there were dealings and adjustments of preparation between the Government and the contractor. They took care of, and were intended to take care of, changing purposes, and no dissatisfaction was expressed.

* * * * *

It is manifest there were uncertainties on both sides and that, as they developed, preparations were necessary to meet them, and in meeting them the contractor did not regard the Government in any way delinquent. It was the abrupt and unexpected suspension of hostilities and the declaration of an armistice that was the cause of loss to the contractor, and the disappointment of profits from its contracts which it was preparing to realize and would have realized. But it took that chance and has not now a legal claim against the Government for reimbursement of its outlays. We need not distinguish between the outlays nor dwell upon them. They were outlays of the speculation and subject to sacrifice and loss with its disappointment.

> We have seen that counsel make much of the effect of the Government's urgency, and, it is contended, time in consequence became an essential of the contract. This, the contention is, influenced the contractor and necessarily determines the obligation of the Government. The Government was undoubtedly urgent, made so by its serious situation and tremendous responsibilities, but such was not the situation of the contractor. Time to perform its contract was all that was necessary to it, and but for the armistice it would have had time. If the armistice could have been foreseen, the relative situations might have been different. Expedition would not then have been exigent to the Government's purposes, but would then have been necessary to the contractor, if profits were to be realized from the production of the motors. There was no prophecy of the armistice—its sudden happening terminated the further execution of the contractor's undertaking, preventing, as we have said, the realization of profits. And, we repeat, this chance the contractor took and must abide the result.

In *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 521, 522, this Court, in affirming the judgment of the Court of Claims, said:

> This disposition of the question also accords with the broad purposes of the legislation. When the act was passed we were in the midst of a great war, which called for the utilization of all our resources. The necessities were great, beyond the power of statement. The Government was confronted with the vital

necessity not only of producing ships and supplies in unprecedented quantities but of producing them with the utmost haste. Hence it was necessary that everything which stood in the way of or hindered such production should be put aside. But this was a necessity which Congress, of course, realized must sooner or later come to an end, suddenly and completely. With the termination of the war the continued production of war supplies would become not only unnecessary but wasteful. Not to provide, therefore, for the cessation of this production when the need for it had passed would have been a distinct neglect of the public interest. The situation, it is plain, required that production should proceed while the war lasted to the utmost limit of the Nation's power, but that it should come to an end as soon as possible upon the passing of the emergency. In the light of these circumstances it is not unreasonable to regard the statute now under consideration as intended to accomplish both results; that is, (1) to enable the President, during the emergency, to utilize his powers over contracts to stimulate production to the utmost, and (2) upon the passing of the emergency; to enable him to utilize these same powers to stop that production as quickly as possible. To the latter accomplishment authority to modify and cancel Government war contracts would contribute most effectively. These considerations lend support to the judgment of the court below construing the statute as having this effect.

Savage Arms Corporation not only did not reject the request of January 29, 1919, immediately to suspend operations with a view to the negotiation of a supplemental contract, but it promptly accepted the same and conducted negotiations with the view to a change of the terms thereof and actually solicited the request for suspension.

If in the first instance the request for suspension which appellant solicited from the Ordnance Department, "without making any claim for any portion of the 142,000 so suspended," had been sent to appellant by the Ordnance Department, it could not seriously be maintained that appellant was entitled to anticipated profits on the suspended 142,000. This is exactly its position here.

Opposing counsel cite *Roehm* v. *Horst*, 178 U. S. 1, 13 (Br. 27), which quotes language of Lord Justice Bowen thus: "The promisee, when confronted with the declaration of intention by the promisor not to carry out the contract, may treat the declaration as *brutum fulmen* and hold fast to the contract." Other cases are cited in support of that position.

The difficulty with their application here is that the appellant did not undertake "to hold fast to the contract" until after it had secured a total profit of $598,086 and a suspension request from the Ordnance Department for the 142,000 magazines. Up until that time the appellant and its representatives were exhausting every effort to get rid of the contract and were "anxious to close this contract on its books."

Opposing counsel contend (Br. 46) that because the Chief of Ordnance, on November 17, 1919, advised the appellant in reply to its inquiries as to the intention of the Government regarding the delivery of the remaining 142,000 magazines or the payment of prospective profits, that he was not authorized to pay anticipated profits on such magazines, the ordnance officer was not denying liability on the contract but was merely restating the holding of this Court in *Cramp Shipbuilding Co.* v. *United States*, 216 U. S. 494, 500. Therefore, counsel say, "the inescapable conclusion is that this agreement never appeared to anybody until the case reached the Court of Claims." (Br. 46.)

Such concluding argument is as far-fetched as all that precedes it. When the Chief of Ordnance advised that "he was not authorized to pay anticipated profits," he certainly was not admitting any liability for the 142,000 magazines for the manufacture and delivery of which appellant had asked to be relieved.

The thoroughly studied and carefully prepared opinion of Judge Booth, of the Court of Claims, concurred in by all of his associates, is entirely adequate and unanswerable.

B. COMPROMISES OF DIFFERENCES GROWING OUT OF CONTRACTS ARE ALWAYS ENCOURAGED AND USUALLY SUSTAINED BY THE COURTS.

The courts are inclined to encourage and sustain compromises in all instances where parties of intelligence have dealt with each other with a complete knowledge of all of the facts and circumstances.

Savage Arms Corporation was the aggressive party in securing the suspension request of September 12, 1919, for which it represented it would make no claim for the 142,000.

In *Mason* v. *United States*, 17 Wall. 66, 72, a case not unlike that at bar, this Court, speaking through Mr. Justice Clifford, said:

> Much discussion of the case is certainly unnecessary, as it is as clear as any proposition of fact well can be, that the claimant voluntarily accepted the modification of the contract as suggested by the commissioners, and that he executed the new contract in its place, which he must have understood was intended to define the obligations of both parties. His counsel suggest that he accepted the new contract without relinquishing his claim for damages, arising from the refusal of the United States to allow him to furnish the whole 100,000 muskets, but the court is unable to adopt that theory, as it is quite clear that he could not have acted with any such motives consistent with good faith toward the War Department, as he must have known that the Chief of Ordnance supposed when he, the claimant, returned the written contract duly executed, that the whole matter in difference was adjusted to the satisfaction of all concerned. Parties are bound to good faith in their dealings with the United States as well as with individuals, and the court is of the opinion that no party in such a case could be justified, after accepting such a compromise and executing such discharge, in claiming damages for a breach of the prior contract

which had been voluntarily modified and surrendered, unless the new contract was accepted under protest or with notice that damages would be claimed for the refusal of the United States to allow the claimant to fulfill the contract which was modified in the new arrangement.

In *Savage* v. *United States*, 92 U. S. 382, 388, this Court, speaking through Mr. Justice Clifford, reaffirmed the principle, thus:

> Parties having claims against the United States, which are disputed by the officers authorized to adjust the same, may compromise the claim, and may accept payment in a different medium from that promised, or may accept a smaller sum than that claimed; and where it appears that the claimant voluntarily entered into a compromise, and accepted payment in full in a different medium from that promised, or accepted a smaller sum than that claimed, and executed a discharge in full for the whole claim, or voluntarily surrendered to the proper officer the evidences of the claim for cancellation, he can not subsequently sue the United States and recover in the Court of Claims for any part of the claim voluntarily relinquished in the compromise. *Sweeny* v. *United States*, 17 Wall. 77; *United States* v. *Child*, 12 id. 244; *United States* v. *Justice*, 14 id. 549.
>
> Decisions of the kind by this court are quite numerous, and they show beyond all doubt that parties may adjust their own controversies in their own way, and that when they

> do so voluntarily, and with a full knowledge of their rights and all the circumstances, no appeal lies to the courts to review their mutual decision. Courts can not make contracts for parties; and if parties understandingly contract to adjust a controversy between them in a particular way, and actually execute the contract, they are both bound to regard the controversy as at an end.

In *Hennessy* v. *Bacon*, 137 U. S. 78, 85, this Court, speaking through Mr. Justice Harlan, said:

> With full knowledge of the title that Rogers had acquired, Hennessy deliberately chose to compromise the dispute between them, as shown by the agreement of 1886 and by the deeds executed in pursuance of its provisions. No fraud was practiced by Rogers. He was guilty of no unfairness. He concealed nothing that he was under legal obligation to state. His information in respect to the title was no greater than Hennessy had or than Hennessy could easily have obtained. It is the case of the compromise of a disputed claim, the parties dealing with each other upon terms of perfect equality, holding no relations of trust or confidence to each other, and each having knowledge, or having the opportunity to acquire knowledge, of every fact bearing upon the question of the validity of their respective claims. *Cleaveland* v. *Richardson*, 132 U. S. 318, 329. Such a settlement ought not to be overthrown, even if the court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained.

See also *French* v. *Shoemaker*, 14 Wall. 314, 333, 334; *Baird* v. *United States*, 96 U. S. 430; *De Wolf* v. *Hays*, 125 U. S. 614; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 216.

III

CONCLUSION

In denying its petition, the Court of Claims very properly assessed the costs against the appellant and its judgment should be affirmed in its entirety.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER, 1924.

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SAVAGE ARMS CORPORATION *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 13. Argued October 6, 1924.—Decided November 17, 1924.

Claimant, having been requested to suspend operations as to a large number of articles it was manufacturing under contract with the Government, sought to confine the suspension to a smaller number, promising if this were done, to abandon and settle all claims and disputes growing out of the contract; and, when the suspension request was revised accordingly, accepted it, but with an attempted reservation of its right to perform the contract and especially its right to recover all the profits it would have made "if it had been permitted to complete the contract." *Held*, that, upon acceptance by the Government of the claimant's proposal, the contract was rescinded as proposed, the release by one party being sufficient consideration for relase by the other; and that the attempted reservation of a right to recover anticipated profits on the articles so eliminated came too late. P. 220.

57 Ct. Clms. 71, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for anticipated profits under a contract to supply magazines for machine guns to the United States, which was in part suspended.

Mr. Jesse C. Adkins, with whom *Mr. John H. Iselin* and *Mr. Frank F. Nesbit* were on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On April 30, 1918, appellant entered into a contract with the United States by which, among other things, it agreed to make and deliver 440,000 magazines for Lewis machine

guns, for which the United States agreed to pay $4.24 each. After 24,347 of the magazines had been delivered, the Chief of Ordnance requested appellant in the public interest immediately to suspend operations under the contract to the extent of 298,000 magazines. Written notice containing this request was sent to the Rochester District Claims Board for delivery to appellant, to whom its purport was communicated by the Board. Thereupon, appellant entered into verbal negotiations with an official of the Board with the result that an understanding was arrived at between them to the effect that the requested suspension should operate to the extent of 142,000 magazines instead of 298,000 as stated in the notice. The negotiations were exclusively with the Claims Board. No reply was made by appellant to the Chief of Ordnance and it does not appear that the Ordnance Office was informed of the arrangement until long afterwards. Appellant, following this arrangement, continued to deliver magazines until May, 1919, at which time there had been delivered 298,000, leaving undelivered 142,000, under the terms of the original contract. Appellant thereafter neither requested to be allowed to furnish nor attempted to furnish this remaining number.

In addition to the contract for the magazines, appellant had a large number of other contracts with the government for furnishing various sorts of munitions and supplies and had numerous accounts relating thereto. It was, therefore, anxious to close this contract on its books, and, especially so, because there was some discussion going on among the Ordnance officials in respect of the suspension request and a possibility that the change agreed upon between the Board (which was without authority) and the appellant might be challenged, and the magazines in excess of 142,000 charged against appellant as having been improvidently accepted and paid for. Appellant, accordingly, wrote to the Secretary of the Claims Board,

asking him to immediately arrange with the proper officer at Washington for a revised suspension request to terminate the contract in respect of the 142,000 undelivered magazines only, and expressly promising that, upon receipt of such request, appellant would "immediately accept it without making claim for any portion of the 142,000 magazines so suspended."

Appellant thereafter persistently and repeatedly urged that the officials of the Ordnance Office revise the suspension request by an order authorizing the delivery of the 298,000 magazines. Finally, on August 20, 1919, appellant again wrote, and, after referring to the fact that 142,000 magazines remained undelivered under the contract, said:

"As we have received and accepted no suspension request for this number, it will be appreciated if you will have forthcoming suspension request for our acceptance in termination of this contract.

"Some time ago we received verbal instruction of the Rochester district office to discontinue the manufacture of these magazines, as they were not wanted. So that there will be no misunderstanding, we are anxious to receive and accept suspension request, otherwise the contract will remain open on our books."

Following this letter, a verbal understanding was reached between appellant and an officer representing the government by which appellant agreed to abandon and settle all claims, controversies and disputed points growing out of contract 48–A if the officer would secure a revision of the suspension request so as to allow the delivery of 298,000 magazines instead of 142,000. Thereupon, a new suspension request was issued by direction of the Chief of Ordnance, in consummation of this last agreement. Subsequently, appellant acknowledged receipt of the revised request, saying that it had suspended work in accordance therewith, "reserving, however, all its rights

against the United States Government. . . . for failure . . . to perform all the provisions of the contract known as No. C.M.G. 48–A and especially its right to recover all the profits which it would have made had it been permitted to complete said contract."

Thereafter, appellant several times inquired of the Chief of Ordnance as to the intention of the government respecting the delivery of the remaining 142,000 magazines or the payment of prospective profits on account of its refusal to receive them, to which that officer replied that the government would not accept delivery and that he was not authorized to pay anticipated profits. Thereupon, appellant brought this suit to recover its anticipated profits.

The Court of Claims rendered judgment in favor of the United States and dismissed the petition.

The bare recital of the facts practically disposes of the case. From them, it appears that appellant not only acceded to the elimination of 142,000 magazines from the obligations of the contract but made persistent and repeated efforts to secure from the Ordnance Office a change in the original notice so as to include that number instead of 298,000, expressly agreeing that if this were done it would abandon and settle all claims, controversies and disputed points growing out of the contract. The government, through its authorized officials, accepted this proposal and the arrangement became fixed and binding. A good deal is said by appellant to the effect that this agreement was without consideration; but we need not stop to review the contention. It is enough to say that the parties to a contract may release themselves, in whole or in part, from its obligations so far as they remain executory, by mutual agreement without fresh consideration. The release of one is sufficient consideration for the release of the other. If authority for a rule so elementary be required, see, for example: *Hanson & Parker* v. *Witten-*

berg, 205 Mass. 319, 326; *Collyer & Co.* v. *Moulton*, 9 R. I. 90, 92; *McCreery* v. *Day*, 119 N. Y. 1, 7; *Dreifus, Block & Co.* v. *Salvage Co.*, 194 Pa. St. 475, 486.

It is true that, after receiving the revised notice, appellant assumed to reserve its right "to recover all the profits which it would have made had it been permitted to complete said contract." The recission of the contract in so far as it was executory,—that is, in respect of the 142,000 magazines—however, had been consummated by the government's acceptance of appellant's proposal. The attempted reservation came too late. Either it was a mere afterthought or there was a concealment of purpose, on the part of appellant during the negotiations, amounting to bad faith. Whether the agreement was made reluctantly, or appellant got the worst of the bargain, are matters unnecessary to be considered. It is enough that, without fraud or coercion, it did agree.

Affirmed.